Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994
No._____

**ILQ INVESTMENTS, INC.
a Minnesota Corporation,
and EXCALIBUR GROUP, INC.,**

Petitioner,

vs.

**CITY OF ROCHESTER, a
municipal corporation,**

Respondent.

PETITION FOR WRIT OF CERTIORARI AND APPENDIX TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Questions Presented

1. Does the operator of a general video and bookstore which devotes approximately 40 percent of its floor space to sexually explicit entertainment have standing to challenge as unconstitutionally vague an ordinance which defines an "adult bookstore" as one which devotes a "substantial or significant portion" of its stock in trade to sexually explicit material?

2. Does a video and bookstore operator so situated have a legal obligation to pursue state administrative and judicial remedies, before commencing a federal action challenging the vagueness of the definition?

3. Is the term "substantial or significant portion," as used to define an adult business in an adult entertainment ordinance unconstitutionally vague, as applied to a general book and video store which devotes approximately 40 percent of its floor space to sexually explicit material?

4. Is an ordinance which defines an adult business for zoning purposes any business establishment which offers any services or entertainment which "emphasize" sexually explicitness unconstitutionally overboard under the First and Fourteenth Amendments to the United States Constitution, in that it is not limited to those uses which have been demonstrated to cause adverse secondary effects?

5. Is a definition of an adult entertainment facility unconstitutionally overbroad, when it imposes adult entertainment zoning restrictions on a business, simply because it denies minors access to that portion of its inventory which is sexually explicit?

6. Are the definitions of adult entertainment unconstitutionally overbroad, to the extent that they include within their purview establishments which do not primarily feature sexually explicit materials and offer no on-premises consumption

of such materials, in the absence of any empirical data showing that such establishments cause adverse secondary effects?

Parties and Proceedings Below

The parties to the proceeding in the District Court were ILQ Investments, Inc., the landowner of the Downtown Book and Video Store in Rochester, Minnesota, and the Excalibur Group, Inc., a Minnesota corporation which leases the subject real estate and operates the store, as Plaintiffs, and the City of Rochester, a municipal corporation, as Defendant.

Review is sought of the decision of the United States Court of Appeals for the Eighth Circuit, June 15, 1994, and for which rehearing was denied on July 22, 1994. The Eighth Circuit's decision is reported at 25 F. 3d 1413 (8th Cir. 1994), and which is set forth in the Appendix at A.134 - A.146. The Eighth Circuit opinion reverses the decision of the United States District Court for the District of Minnesota, reported as ILQ Investments, Inc. v. City of Rochester, 816 F. Supp. 516 (D. Minn. 1993), a copy of which is set forth in the Appendix at A.111 - A.133.

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Jurisdiction

Review is sought of a decision of the United States Court of Appeals for the Eighth Circuit, entered June 15, 1994, for which rehearing was denied on July 22, 1994. Jurisdiction is based upon Title 28 U.S.C. Section 1254(1).

Constitutional and Statutory Provisions Involved

This case involves the First and Fourteenth Amendments to the United States Constitution the texts of which are set forth in the Appendix at A.147, and Rochester City Ordinance No. 2590, the text of which is set forth in the Appendix at A.14 - A.23.

Statement of the Case

In late July of 1992, Petitioner Excalibur Group, Inc., as tenant, opened for business a store entitled "Downtown Book and Video," at 220 S.W. 1st Avenue, in the City of Rochester, in a building owned by Petitioner ILQ Investments, Inc. (Appendix at A. 6).

For the most part, the store is primarily a general book and video store, with some 60 percent of its floor space being devoted to the sale of books, magazines and the rental of video tapes of a non-sexual nature. All persons, regardless of age, are admitted to this portion of the floor space (Id. at A-6).

However, a minority of floor space, approximately 40 percent, is devoted to books, magazines, video tapes and other material of a sexually explicit nature (Appendix at A-6). In order to comply with the provisions of Minnesota Statutes Section 617.293, Subd. 2(c),[1] the store features no on-premises

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[1] Minnesota Statutes Section 617.293 generally prohibits the commercial and knowing display to minors or printed material deemed "harmful to minors," as defined in the statute. However, subparagraph (c) of subdivision 2 provides, "A person may comply with the requirements of this paragraph by (1) physically

consumption of sexually-explicit materials; rather, all of the merchandise offered is exclusively take-home in character (Appendix at A-6).

On August 7, 1992, Petitioners were issued two notices of zoning violation, both of which related to Appellant's assertion that Petitioners' bookstore was an adult use within the meaning of Rochester Ordinance No. 2590, governing adult uses, and that it was within 750 feet of the Rochester Public Library, in violation of Rochester Code of Ordinances Section 65.720.[2] The pertinent provisions in Rochester Ordinance No. 2590 are the following:

Section 60.4012 defines the term "adult bookstore" as follows:

> A business engaging in the barter, rental, or sale of items consisting of printed matter, pictures, slides, records, audio tapes, video tapes or motion picture film, if such shop is not open to the public generally but only to one or more classes of the public, excluding any minor by reason of age, or if a substantial or significant portion of such items are distinguished or characterized by an emphasis of the depiction or description of 'specified sexual activities' or 'specified anatomical areas.'" Appendix at A.14-15.

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segregating the material in a manner that physically prohibits access to and view of the material by minors, (2) prominently posting at the entrance to the restricted area: 'Adults Only -- You Must be 18 to Enter,' and (3) enforcing the restriction" The District Court, in its order of February 22, 1993, expressly found Petitioners to be in compliance with this statutory mandate. See ILQ Investments v. City of Rochester, 816 F. Supp. 516, 519, n. 4(D. Minn., 1993), Appendix at A.112 - 113, n.4.

[2] Petitioners do not dispute that their store is located within 750 feet of the Rochester Public Library.

Section 60.4015 defines the term "adult establishment" as follows:

> "A business engaged in any of the following activities or which utilize any of the following business procedures or practices; either:
>
> a. Any business which is conducted exclusively for the patronage of adults and as to which minors are specifically excluded from patronage thereat either by law or by the operators of such business, except any business licensed under Chapter 125A of the Rochester Code of Ordinances;[3] or,
>
> b. Any other business which offers its patrons services or entertainment characterized by an emphasis depicting, exposing, describing, discussing or relating to 'specified sexual activities' or 'specified anatomical areas.'" Id. A.15-16.

The locational requirements for adult uses, so defined, are set forth in Section 65.720 as follows:

> "All adult establishment uses shall be located not less than 750 feet from any residential district boundary, from any church, from any school, or from any youth facility. In addition, no adult established use may be located within 750 feet of another adult establishment use." Id. at A-22.

The term "youth facility," is defined in Section 60.4795 as,

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[3] Chapter 125A of the Rochester Code of Ordinances is the provision governing the licensing of intoxicating liquor and non-intoxicating malt liquor. The exception is of no relevance in this case.

"a public playground, public swimming pool, public library, or licensed day care facility." Id. A.20-21.

The Notice of Violation, a copy of which is set forth in the Appendix at A.24-25, demands that the "adult entertainment" use cease within five days of receipt and threatens criminal penalties of 90 days' imprisonment and a fine of $700.00 for each day of noncompliance.

Petitioners sought timely review of the notices of violation before the Rochester Board of Zoning Appeals, and the Rochester City Council, both of which affirmed the orders in question. The City Council determined that Petitioners' business constituted an "adult bookstore" or an "adult establishment" for the following reasons:

> "5. By a preponderance of the evidence presented, the Common Council determined that ILQ operated the business located at 220 First Avenue S.W. is an adult bookstore on the basis that the bookstore is not open to the public generally but only to one or more classes of the public and doesn't exclude any minor by reason of age.
>
> 6. By a preponderance of the evidence presented, the Common Council determined that ILQ operated the business located at 220 First Avenue S.W. is an adult bookstore on the basis that a substantial or significant portion of the bookstore's items are distinguished or characterized by an emphasis on the depiction or description of 'specified sexual activities' or 'specified anatomical areas' as the latter terms are defined by the Rochester Zoning Ordinance.
>
> 7. By a preponderance of the evidence presented, the Common Council determined that ILQ

> operated the business located at 220 First Avenue S.W. is a business which offered its patrons services or entertainment characterized by an emphasis depicting, exposing, describing, discussing or relating to 'specified sexual activities or 'specified anatomical areas', as the latter terms are defined by the Rochester Zoning Ordinance." Appendix at A.31-32.

Thereafter, Petitioners commenced the present action in United States District Court seeking a determination that the Rochester Ordinance, both facially, and as applied, violated the First and Fourteenth Amendments to the United States Constitution.

A hearing was held on February 18, 1993, before the Honorable Richard Kyle in United States District Court on Petitioners' Motion for Preliminary Injunction. At that hearing, Petitioners' counsel made the following remarks:

> "In August of 1992, my clients were issued orders from the City of Rochester that said comply with this ordinance in five days. From day one they asked a simple question of the City of Rochester, 'What do I do to comply?' the same question was asked at the Board of Zoning Appeals. Same question was asked at the City council. If 40 percent is too much under the substantial and significant, how do I do what you ordered me to do, which is comply with the ordinance? Zoning inspectors haven't given us an answer. The Board of Zoning Appeals haven't (sic) given an answer. City Council hasn't given us an answer. And in 30 pages of memo from Mr. Thomson (Appellant's counsel) and subsequent letters, they haven't attempted to give you an answer. I will

make a prediction. By the end of the argument today, you will still not have heard an answer from Mr. Thompson, or if you have heard an answer, you will not have heard a justification to how he comes to that answer. If 40 percent is too much, what about 30 percent? What about 25? What about 50? What about 20? How do you make a distinction under the substantial or significant language?" Appellants' Appendix at App. 508.

Counsel's prediction was prophetic. Upon Respondent's counsel advancing the argument that the "substantial or significant" language adequately apprised Petitioner of what conduct would be required to comply with the ordinance, the District Court, by Judge Kyle, engaged in the following dialogue, with Respondent's counsel:

"THE COURT: If you have this business saying how to we comply, assuming that's the question, they come down to City Council or the City Attorney's office and say, okay, 40 percent is too much, what do we do, we're willing to cut back space or sales or something, who's going to give them an answer to that question?

MR. THOMSON: The City is, Your Honor. There is no question about that.

THE COURT: What are they going to tell them? What's the answer going to be?

MR. THOMSON: I think the answer might be different in any case.

THE COURT: I am only interested in Rochester.

> MR. THOMSON: Your Honor, Mr. Tigue is right. Standing here today I can't tell you, because that issue hasn't come before the City yet." Appendix at A-106.[4]

The legislative history concerning the enactment of Ordinance No. 2590 indicates that, as a factual basis for adoption of the ordinance, the City of Rochester relied upon a study of adult entertainment in Indianapolis, Indiana; two studies of adult entertainment from St. Paul Minnesota; a study of adult entertainment from Phoenix, Arizona; and the report of the American Society of Planning Officials.[5]

Absolutely none of the studies relied upon by the City of Rochester dealt with any establishments even remotely similar to that operated by Petitioners to-wit: a general release book and video store, with an adult-only section consisting of a minority of floor space, and with no on-premises consumption of sexually explicit materials. None of the studies cited any adverse secondary

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[4] While Mr. Thomson's answer that he couldn't answer what Petitioners would have to do in order to comply with the ordinance was truthful, his assertion that the matter had not come before the city yet was not. As already noted, supra, it was specifically brought to the City's attention both at the time of the hearing before the Zoning Board of Appeals, and at the time of the hearing before the City Council. The only reason the City had not provided an answer is that it had chosen not to.

[5] The pertinent portions of these studies are set forth in the Appendix at A.62-A.77. All of these studies, in one way or another, concluded that adult entertainment had "secondary effects" on the surrounding neighborhoods, such as an increase in crime, and a decline in property values. However, all of these studies dealt with establishments dealing primarily, if not exclusively, with sexually explicit materials, and featuring on-premises of such material, such as on-premises viewing in theaters, peep shows, and live nude dancing.

effects which would arise out of the proximity of such activities to public libraries or other youth centers.

In granting Petitioners' Motion for Preliminary Injunction, the District Court expressly found:

> "Of the studies that define what is meant by 'adult entertainment' or 'adult business,' none of the definitions supports a conclusion that the studies consider the secondary effects produced by businesses that sell sexually explicit material as a portion of a retail mix that involves non-sexually materials (footnote omitted)." 816 F. Supp. at 526, Appendix at A.129 - 130,

The District Court further found:

> "Moreover, although each of the studies concluded that there were secondary effects produced by 'adult' businesses, none of those studies discussed, much less concluded, that any business selling any amount of sexually explicit material produced secondary effects similar to those produced by businesses engaging exclusively or primarily in selling or making available sexually explicit material (footnote omitted). Neither do those studies support a reasonable inference that because a bookstore purveying only sexually explicit material and allowing on-premises consumption produces unwanted secondary effects, a bookstore featuring both sexually explicit and non-sexually explicit materials and requiring off-premises consumption produces the same effects (footnote omitted)." 816 F. Supp. at 526 - 527. Appendix at A.131.

ARGUMENT

I. THE EIGHTH CIRCUIT'S OPINION ON THE ISSUE OF THE "VAGUENESS" OF A "SUBSTANTIAL OR SIGNIFICANT PORTION" DEFINITION IS AT ODDS WITH THE APPLICABLE DECISIONS OF THIS COURT, OTHER COURTS OF APPEAL, AND HIGHEST STATE COURTS OF LAST RESORT.

A. THE EIGHTH CIRCUIT'S HOLDING THAT PETITIONERS LACK STANDING TO BRING A VOID FOR VAGUENESS CHALLENGE IS CONTRARY TO THE DECISIONS OF THIS COURT AND OF COURTS IN OTHER JURISDICTIONS.

As noted, supra, Section 60.4012, of Rochester City Ordinance Section 2590 defines the term "adult bookstore", inter alia, as one in which a "substantial or significant portion" of the items offered for sale are characterized by an emphasis on "specified sexual activities" or "specified anatomical areas." It is undisputed that some 60 percent of Petitioners' floor space is devoted to the sale and rental of materials which do not fall within the definition, the remaining 40 percent being contained in a separate area from which minors are excluded, and that Respondent, from the outset, has refused to define what the ordinance means.

To hold, as the Eighth Circuit did, that, under these circumstances, Petitioners lack standing to challenge the unconstitutional vagueness is plainly at odds with applicable decisions of this Court and persuasive authority from other jurisdictions.

The Eighth Circuit first argued a lack of standing, based on the language in Young v. American Mini Theaters, 427 U.S. 50, 58 - 59, (1976), to the effect that, "One to whose conduct the

statute clearly applies may not successfully challenge it for vagueness." In that case, this Court refused to grant standing to adult motion picture theaters to challenge "substantial or significant" language, because the ordinances were "unquestionably applicable" to those theaters.

However, the reason the ordinances were "unquestionably applicable" was that neither theater had "indicated any plan to exhibit pictures even arguably outside the coverage of the ordinances." Id. at U.S. at 59, n. 16. By contrast, some 60 percent of Petitioners' floor space is devoted to uses entirely outside the scope of the ordinance, and Petitioners have repeatedly requested of Respondent a definition of what percentage they would be permitted to retain and still comply with the ordinance, a question which Respondent, to this day, refuses to answer.[6]

While it is true that in cases such as Dandy Co., Inc. v. Civil City, 401 N.E. 2d 1380 (Ind. App. 1980), and City of Chicago v. Scandia Books, Inc., 430 N.E. 2d 14 (Ill. App. 1981), have held that as little as 30 percent of the stock in trade could constitute "substantial or significant," other courts have construed the identical language to require a "preponderance" of adult material to satisfy the "substantial or significant" language. See, for example, Pringle v. City of West Covina, 115 Cal. App. 3d 151, (1981), and Kuhns v. Board of Supervisors of Santa Cruz County, 128 Cal. App. 3d 1369, (1982).[7]

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[6] Notwithstanding the fact that Respondent cannot tell what the ordinance means, Respondent has nonetheless counterclaimed asking the District Court to enjoin Petitioners from violating an ordinance which Respondent cannot define. See Respondent's counterclaim, set forth in the Appendix at A-38.

[7] Indeed, the very fact that different courts, reading the identical language, reached drastically different conclusions as to what it means is itself compelling evidence of unconstitutional vagueness. See Connally v. General Construction

Next the Eighth Circuit asserts that Petitioners' "First Amendment interest is relatively weak," relying on language from the plurality opinion in Young, that "there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline pornography and artistic expression than in the free dissemination of social and political significance." 427 U.S. at 61, cited at 25 F. 3d at 1410, Appendix at A.144 - 145. In this regard, it should be noted that the proposition of law relied upon by the Eighth Circuit was one which not only did not command a majority of this Court in Young, it was rejected by a majority of the Justices in that opinion, and has not been adopted by any majority since. It is important to note in that case that while a four-justice plurality in that case did state that sexually explicit speech was entitled to a lesser degree of First Amendment protection than other speech, that proposition was expressly rejected by the majority of the Court. The four dissenting justices, in an opinion written by Justice Stewart stated:

> "By refusing to invalidate Detroit's ordinance the Court rides roughshod over cardinal principles of First Amendment law, which require that time, place, and manner regulations that affect protected expression be content-neutral except in the limited context of a captive or juvenile audience (footnote omitted). In place of these principles the Court invokes a concept wholly alien to the First Amendment. Since 'few of us would march our sons and daughters off to war to preserve the citizens right to seek 'Specified Sexual Activities' exhibited in the theaters of our choice,' [citation

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Co., 269 U.S. 385, (1925), and State v. Newstrom, 371 N.W. 2d 525 (Minn. 1985).

> omitted] the Court implies that these films are not entitled to the full protection of the Constitution. This stands 'Voltaire's immortal comment,' [citation omitted], on its head. For if the guarantees of the First Amendment were reserved for expression that more than a 'few of us' would take up arms to defend, then the right of free expression would be defined and circumscribed by current popular opinion. The guarantees of the Bill of Rights were designed to protect against precisely such majoritarian limitations on individual liberty (footnote omitted)." 427 U.S. at 85-86, Stewart J. dissenting.

The fifth vote which gave the Court its majority in Young was provided in the concurring opinion of Justice Powell, who also expressly rejected the plurality's opinion that sexually speech was entitled to a lesser degree of First Amendment protection. Justice Powell, in concurring in Young, wrote:

> "I do not think we need reach nor am I inclined to agree with the holding in Part III (and supporting discussion) that non-obscene erotic materials may be treated differently under First Amendment principles from other forms of protected expression. I do not consider the conclusions in Part I to depend upon distinctions between protected speech." 427 U.S. at 73, n. 1, Powell J., concurring.

In this regard, it should be noted that even subsequent to Renton, in FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, (1990), the United States Supreme Court invalidated a Dallas, Texas, municipal ordinance aimed directly at sexually explicit businesses, licensing such businesses, in violation of long-established First

Amendment principles. The case clearly presented and opportunity for the Court to adopt the position that sexually explicit speech is entitled to lesser protection than First Amendment speech generally. It plainly did not do so, and only the dissenting opinion of Justice Scalia even remotely hinted at such a result. See Id. at 617-625, Scalia J. dissenting.

The Eighth Circuit then asserts that Petitioners are not "primarily concerned with [their] right of free expression, or [they] would have located Downtown Book and Video in an unrestricted part of the city." 25 F. 3d at 1410, Appendix at A.145. The assertion obviously begs the question. If Petitioners' operation is not an "adult bookstore" within the meaning of the ordinance, it need not locate in the relatively limited adult zone. If this standard were uniformly adopted, no one would ever have the right to challenge an unconstitutionally vague or overbroad law.

Even more incredible is the panel's subsequent assertion:

> "ILQ is also not primarily concerned with the risk of criminal prosecution, or it would have applied for a change-of-use certificate rather than confronting the city with an up-running adult bookstore in the downtown area." 25 F. 3d at 1419, Appendix at A.145.

The assertion is obviously contrary to numerous long-standing principles of First Amendment law long established by this Court.

Most obvious is the fact that this assertion again begs the question. Unless the new use constitutes an "adult bookstore" there is no need to apply for a change of use certificate.

More serious, is the fact that the assertion carries with it the notion that, when confronted with a vague ordinance carrying criminal penalties, one is obligated to exhaust local administrative

remedies, before mounting a constitutional challenge, a proposition which this Court has repeatedly and unhesitatingly rejected. See Monroe v. Pape, 365 U.S. 167, (1961); and Patsy v. Board of Regents of the State of Florida, 457 U.S. 496, (1982).

Finally, the argument runs directly contrary to this Court's long-standing rule that, when confronted with a permit, license, or certificate ordinance that violates the First Amendment, there is no need to apply for a certificate, permit, or license, prior to bringing a Federal Constitutional challenge, either as a defense to criminal prosecution, or by affirmative relief under Section 1983. See Lovell v. City of Griffin, 303 U.S. 444, 452 - 453, (1938); Freedman v. Maryland, 380 U.S. 51, 56 (1965); Staub v. City of Baxley, 355 U.S. 313, 319 (1958); Shuttlesworth v. City of Birmingham, 394 U.S. 417 (1969); and FW/PBS, Inc. v. City of Dallas, supra, 493 U.S. 215, (1990).

B. THE EIGHTH CIRCUIT'S OPINION ON THE SUBSTANCE OF THE VAGUENESS ISSUE CREATES A CONFLICT WITH A HIGHEST STATE COURT OF LAST RESORT AND WITH OPINIONS FROM OTHER JURISDICTIONS.

On the merits of Petitioners' vagueness claim, the Eighth Circuit asserted that the terms "substantial or significant portion" are terms "not devoid of meaningful legislative standards," and that Petitioners should be "subject to the same tensions and uncertainties that regulations typically impose upon other legitimate enterprises." 25 F. 3d at 1419, Appendix at A.145.

The holding is clearly in conflict with at least one state court of last resort, and with at least two United States District Courts.

In Cline v. City of Oklahoma City, 839 P. 2d 657 (Okl. Cr. 1992), the court reversed a criminal conviction for operating an adult bookstore without a conditional use permit based upon the

unconstitutionality of the city ordinance which defines an "adult bookstore" as "an establishment having as a significant portion of its stock in trade" publications of a sexually explicit nature. The testimony at trial was that approximately 30-40 percent of the store's content consisted of sexually explicit publications, with the remainder being non-adult merchandise.[8] In declaring the ordinance unconstitutional as applied, the court stated:

> We find that a proprietor would have no way of knowing whether he was complying with the ordinance or not. Indeed, as Mr. Andrada testified, it was not until Appellant Cline had already been issued a citation that members of the zoning department got together and came up with the figure of ten percent as constituting a significant portion of stock in trade. While we render no opinion on any certain percentage, nor who may set such percentage, we do find the ordinance as it is being applied as any notice to individual proprietors as to whether they are within or outside the law." Id. at 659.

Likewise, Respondents in the instant case refuse to define what the ordinance means, and will invent a definition, only after Petitioners are prosecuted.

Likewise, in Pensack v. City and County of Denver, 630 F. Supp. 177 (D. Colo. 1986), the court invalidated an Aurora, Colorado Zoning Ordinance containing the same "substantial or significant portion of its stock in trade in books, magazines, and

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[8] See Id. at 658.

other periodicals and goods" language contained in the Rochester ordinance. The Plaintiff in that case was the proprietor of a business entitled "Le Bakery Sensual," which, inter alia baked and sold "theme cakes" many of which "have strong sexual themes, and include depictions of sexual organs and sexual activities." Id. at 178. The bakery also sold numerous cakes which did not have sexual themes. The court held that application of the zoning ordinance to them deprived them of due process of law, in that it did not give adequate notice as to the conduct prohibited by the ordinance. The court stated:

> "The Plaintiff has made the argument that the ordinance is unconstitutional because it is too vague. The facial validity of the ordinance need not be decided in this case. As applied to Le Bakery, the adult bookstore restrictions of the Denver Ordinance are a denial of due process because there is no adequate notice to the Plaintiff as to what is restricted, and there are no sufficient standards for law enforcement to avoid the chilling effect on speech that is the consequence of uncertainty. [Citations omitted.] As applied to Plaintiff's business, the ordinance is also overbroad because it affects or suppresses expression which is wholly unrelated to the governmental interest. [Citation omitted.] Le Bakery is denied the opportunity to bake and sell children's birthday cakes at 360 Broadway because a varying and undeterminable number of cakes may be ordered and sold with explicit sexual communications." Id. at 181.

Also instructive is Ellwest Stereo Theater v. Boner, 718 F. Supp. 1553 (M.D. Tenn. 1989), in which the court invalidated the identical language in an adult bookstore licensing ordinance as unconstitutionally vague. The court's comments concerning the

facts of the case are strikingly similar to the evidence before the court in the instant case:

> "Mr. Eadie, the person designated by the Health Department as the person who would have knowledge of the Health Department's operation, management and enforcement of the ordinance, first testified that 'substantial or significant' meant that greater than half of what a bookstore offers for sale must be adults-oriented material. [Citation omitted.] He then changed his testimony, stating that he could not quantify the term 'significant or substantial' and stated that the ordinance would cover bookstores which sold less than 50 percent adult-oriented materials. [Citation omitted.] Finally, Mr. Eadie testified that the real concern of the Health Department was not with what percentage of the material sold at the bookstore was adult-oriented but was with the activities which occurred in these bookstores and that the ordinance sought to regulate the adult bookstores in which there were enclosed booths in which sexual activities occur. [Citation omitted.] The Court finds it extremely revealing that a representative of Health Department, the agency charged with administering this ordinance, was unable to determine under the ordinance which establishments it was entitled to regulate. Clearly, if the regulating authority cannot determine the establishments which are subject to its authority, the establishments themselves cannot be expected to determine whether they need to be licensed or not." Id. at 1581.

Obviously, Respondent takes the identical posture in the instant case. It claims that the "substantial or significant" language gives notice to store operators as to what is prohibited, yet even Respondent does not have the slightest idea as to what the

language means. Petitioners, like the store owners in Cline and Ellwest are left to guess at what officials will consider "substantial or significant," and face the penalty of 90 days and a $700.00 fine for each day of a wrong guess.[9]

In upholding the validity of the ordinance against a vagueness challenge, the Eighth Circuit relies upon the fact that similar language appears elsewhere in the United States Code, such as in Title 42 U.S.C. Section 2000(a)(c). However, the reasoning ignores the fact that this Court has repeatedly held that where criminal penalties are involved or First Amendment rights are restricted, a substantially higher degree of precision is required. See Smith v. Goguen, 415 U.S. 566 (1974). In that case, and in numerous other cases, this Court has plainly held that First Amendment rights cannot be "subject to the same tensions and uncertainties that regulations typically impose upon other legitimate enterprise."

C. THE EIGHTH CIRCUIT IGNORED LONG-STANDING RULES ESTABLISHED BY THIS COURT IN HOLDING THAT PETITIONERS WERE REQUIRED TO PROCEED INITIALLY IN STATE COURT, BEFORE BRINGING A FEDERAL ACTION CHALLENGING THE VAGUENESS OF THE ORDINANCE WHICH GOVERNED THEM.

In its opinion, the Eighth Circuit asserts:

> "ILQ intentionally declined to present its vagueness and overbreadth claims to the state

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[9] In this regard, see also Alexander v. City of Minneapolis, 713 F. Supp. 1296, 1303 (D.Minn.1989), vacated as moot, 928 F. 2d 278 (8th Cir. 1991).

> courts, choosing instead to bring these claims, in the form of largely hypothetical enforcement issues, in federal court." 25 F. 3d at 1419, Appendix at A-146.

The assertion is erroneous both factually and legally.

The assertion is erroneous factually, since Petitioners' claims are anything but "hypothetical." Petitioners have been ordered to comply with the terms of the provisions of the ordinance within five days, have been threatened with criminal prosecution if they do not comply, and are confronted with an ordinance they do not understand, and which Respondent refuses to explain to them. Moreover, Respondent has counterclaimed and requested the District Court to issue a permanent injunction compelling Petitioners to comply with an ordinance which no one can define. There is very little that is "hypothetical" about that predicament.

More significantly, the assertion is erroneous legally, since it presumes that when confronted with such an ordinance, Petitioners are somehow legally obligated to proceed first into state courts, prior to seeking federal relief, a proposition which this Court has repeatedly rejected. See, for example, Brockett v. Spokane Arcades, Inc., 454 U.S. 1022 (1981), in which the majority of this Court summarily affirmed a federal action facially invalidating Washington's moral nuisance statute, over the dissents of three justices, led by Chief Justice Burger, arguing that there was an obligation to present the claim to state court in the first instance; Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985), holding a facial challenge in federal court to a subsequently enacted version of the moral nuisance statute to be proper; and FW/PBS, Inc. v. City of Dallas, supra, 493 U.S. 215 (1990), upholding a facial challenge under the First Amendment to a

licensing ordinance, indicating that such First Amendment challenges are properly brought in federal court in the first instance.[10]

II. THE EIGHTH CIRCUIT'S HOLDING THAT APPLICATION OF ADULT ENTERTAINMENT ZONING ORDINANCES TO USES SUCH AS PETITIONERS' IS IN CONFLICT WITH LONG-ESTABLISHED DECISIONS OF THIS COURT, WITH OPINIONS FROM OTHER FEDERAL CIRCUITS, AND WITH OPINIONS FROM STATE COURTS OF LAST RESORT.

A. INTRODUCTION – STANDARDS FOR JUDGING CONTENT-BASIS OF ADULT ENTERTAINMENT ZONING ORDINANCES.

It is undisputed that ever since adult entertainment zoning ordinances were first upheld in Young v. American Mini Theaters, supra, 427 U.S. 50 (1976), they have been upheld only in circumstances in which the legislative history demonstrated that they were enacted on the basis of an empirical showing that they were designed to combat adverse secondary effects of adult entertainment, not as a reaction to the content of the material itself. Where such showings have not been made, adult entertainment ordinances have been invalidated, notwithstanding their superficial

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[10] As part of the same argument, the Eighth Circuit cites Young for the proposition that any vagueness is readily subject to narrowing construction by the state courts. 25 F. 3d at 1419, Appendix at A.145 - 146. The obvious problem is that not only has Respondent not suggested any narrowing construction which might be available in the state courts, but Respondent has adamantly refused to do anything to ameliorate the vagueness. The suggestion that a "narrowing construction" could resolve the problem was quite properly rejected in similar circumstances in CLR Corp. v. Henline, 520 F. Supp. 760, 762 (W.D. Mich. 1981), aff'd, 702 F. 2d 637 (6th Cir. 1983).

similarity to Young. See, for example, Avalon Cinema Corp. v. Thompson, 667 F. 2d 659 (8th Cir. 1981), and E & B Enterprises v. City of University Park, 449 F. Supp. 695 (N.D. Tex. 1977).

Most common among these lines of cases have been adult entertainment zoning ordinances which have attempted to define adult entertainment in such a manner that a single showing of an adult motion picture film would render a theater an "adult theater" for purpose of the ordinance, courts universally holding that no study anywhere has shown that a single showing of a sexually explicit film at an otherwise general release theater would cause any of the adverse secondary effects attributed to "adult theaters" in Young and its progeny. See, for example, Pringle v. City of West Covina, supra, 115 Cal. App. 3d 151, (1981); People v. Superior Court (Lucero); 49 Cal. 3d 14, (1989); and Tollis, Inc. v. San Bernardino County, 827 F. 2d 1329 (9th Cir. 1987).

In Tollis, the court clearly stated the appropriate test under City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986), as follows:

> "To be acceptable as a content-neutral time, place, and manner regulation, an ordinance must be 'designed to serve a substantial governmental interest and allow for reasonable alternative avenues of communication.' [Citation to Renton omitted.] We agree that the County has a substantial interest in preventing the deleterious secondary effects often associated with adult theaters. [Citation omitted.] At minimum, however, there must be a logical relationship between the evil feared and the method selected to combat it. [Citation omitted.] The county must show that in enacting the particular limitation it places upon adult theaters, it relied upon evidence permitting the reasonable inference, that, absent such limitations, the adult theaters would have

harmful secondary effects. [Citations omitted.]

> Here, the county has presented no evidence that a single showing of an adult movie would have any harmful secondary effects on the community. The county failed to show that the ordinance, as interpreted by the County to include any theater that shows an adult movie a single time, is sufficiently 'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects' [Citation to Renton omitted.]" Id. at 1332 - 1333.

Judged by this standard, Respondent has failed to make the requisite showing in at least three respects.

B. THE ORDINANCE ON ITS FACE IS OVERBROAD, IN THAT IT MAKES A SINGLE SALE OR RENTAL OF SEXUALLY EXPLICIT MATERIAL A BASIS FOR DETERMINING AN ESTABLISHMENT TO BE AN "ADULT ESTABLISHMENT" AND THUS SUBJECT TO ADULT ZONING RESTRICTIONS.

The most obvious failure of the Rochester ordinance to meet the Tollis standard is in the provisions of Section 60.4015b, the definition of "adult establishment" in which a business may become an "adult establishment" based upon nothing more than a single adult use, the very proposition invalidated in Pringle, supra; and Tollis, supra. That section defines the term "adult establishment to include:

> "Any other business which offers its patrons services or entertainment characterized by an emphasis depicting, exposing, describing, discussing or relating to specified sexual activities or specified anatomical areas."

Under the plain language of this provision, any business which offers its patrons any services or entertainment characterized by an emphasis on sexually explicitness becomes an adult business, regardless of the limited nature of any such services or entertainment. Thus, the offering of a single sexually explicit video tape or live performance characterized by an emphasis on sexual matters renders an establishment an "adult establishment" under the definition. Obviously, this is clearly unconstitutional for the very reasons set forth in Pringle, supra, and Tollis, supra.

In construing the ordinance, the District Court plainly found this to be an accurate construction of the ordinance. The District Court wrote:

> "Rochester responds that it has construed the definition of "adult establishment" in Section 60.4015(b) to apply only to businesses which are characterized by an emphasis on sexually explicit material. Rochester contends that under this construction, Ordinance 2590 does not apply to businesses that sell only a small portion of sexually explicit materials; rather, the Ordinance applies only to businesses that emphasize (emphasis by the court) sexually explicit material. Rochester further contends that ILQ's bookstore does emphasize sexually explicit material and thus is properly covered by the ordinance.
>
> There is nothing in the record, however, which indicates that Rochester has applied such a limiting construction to Sec. 60.4015(b). Accordingly, for purposes of this motion, the Court will consider the definition as set forth in the Ordinance and assume that under Section 60.4015(b), an adult business includes a business that provides any entertainment which is 'characterized by an emphasis on matter depicting, exposing, describing, discussing or relating to' sexually explicit expression. Under this

definition, Ordinance No. 2590 clearly applies to ILQ's Bookstore." 816 F. Supp. at 524, Appendix at A. 124 - 125.[11]

C. THE ORDINANCE ADVANCES ABSOLUTELY NO PUBLIC PURPOSE BY DISTINGUISHING BETWEEN ESTABLISHMENTS WHICH DENY MINORS ACCESS TO SEXUALLY EXPLICIT MATERIALS AND THOSE WHICH PERMIT SUCH ACCESS. AS A RESULT, THAT PORTION OF THE ORDINANCE PLAINLY FAILS THE TOLLIS TEST.

Another provision of the ordinance again totally ignored in the Eighth Circuit opinion is Section 60.4012, which defines the term "adult bookstore" as an establishment dealing in the sale or rental of printed, audio or video material, but only "if such shop is not open to the public generally but only to one or more classes of the public, excluding any minor by reason of age..." This provision formed a separate and distinct basis for the City Council's determination that Petitioners' business was an "adult bookstore." See Appendix at A.33.

As already noted, supra, it was undisputed that minors are not excluded from Petitioners' store generally, but rather only from that portion of the store in which sexually explicit materials are sold or distributed, in direct compliance with the provisions of Minnesota Statutes Section 617.293, Subd. 1(c), prohibiting the display of certain sexually explicit materials to minors, a provision

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[11] As was the case with the vagueness argument, there is absolutely nothing "hypothetical" about Petitioners challenge to this provision. A separate and distinct basis for both the Board of Zoning Appeals and the City Council's decision determining Petitioners' business to be an "adult establishment" was that it fell within the purview of Section 60.4015b by offering entertainment "characterized by an emphasis" on sexually explicit materials. See Appendix at A.33

directly patterned after the Minneapolis Ordinance upheld in Upper Midwest Bookseller's Ass'n v. City of Minneapolis, 780 F. 2d 1389 (8th Cir. 1985). Thus, what the provision in the ordinance tells to Petitioners and to any other seller of sexually explicit material is that, if they follow the mandates of the law and act responsibly, excluding minors from areas in which sexually explicit materials are sold, rented, or displayed, they will be subject to restrictive adult entertainment zoning laws. By contrast, were Petitioners to permit minors to have access to areas in which sexually explicit materials are sold, they could locate their store next to an elementary school, with impunity. Apart from the inherent absurdity of such a provision, the provision obviously violates the Tollis-Renton standard in at least the following respects:

First of all, neither Respondent nor the Eighth Circuit identifies any "substantial governmental interest" that is furthered by such a provision. Quite to the contrary the provision directly undermines government's substantial interest in keeping sexually explicit materials away from minors, an interest recognized in Upper Midwest Booksellers, supra, and by this Court in Ginsberg v. New York, 390 U.S. 629 (1968).

Secondly, even if such an interest were shown, absolutely no relationship is shown between the evil feared and the method selected to combat it, to-wit: there has been absolutely no showing that the distinction drawn in the ordinance bears any evidence whatsoever to combatting adverse secondary effects. What secondary effects are caused by businesses which sell sexually explicit material and prevent minors from having access to those materials, that are not caused by establishment which sell sexually explicit materials and do not deny minors access to the areas in which such materials are sold?

Obviously, the reason that neither Respondent nor the

Eighth Circuit has an answer to the question, is that there is none.

D. THE ORDINANCE IS IMPERMISSIBLE CONTENT-BASED DISCRIMINATION, IN THAT THERE IS NO SHOWING THAT THE TYPE OF BUSINESS REGULATED, TO-WIT: GENERAL VIDEO STORES WITH ADULTS-ONLY SECTIONS, CONSTITUTING A MAJORITY OF FLOOR SPACE, CAUSE ANY ADVERSE SECONDARY EFFECTS.

In its opinion, the Eighth Circuit does not dispute the District Court's factual findings that none of the studies relied upon by the City of Rochester in enacting Ordinance 2590 supported the proposition that retail establishments featuring no on-premises consumption, and consisting of a mix of both sexual and non-sexual materials cause any adverse secondary effects. See 816 F. Supp. at 526, (Appendix at A.129 - 131). Rather, the Eighth Circuit dismissed these undisputed factual determinations as irrelevant, holding that Respondent City Council "reasonably believed that the evidence was relevant to the problems addressed by Ordinance No. 2590." 25 F. 3d at 1418, Appendix at A.142-143. In so doing, the Eighth Circuit dishonestly characterizes Petitioners' business as an 'adult bookstore' that offers both sexually explicit and non-sexually explicit materials and allows only off-premises consumption of those materials" 25 F. 3d at 1417, Appendix at A.141. It further characterizes the establishment as "a new type of adult business." Id at 1418, Appendix at A.143. Petitioners' business is neither. It is not an "adult bookstore" that sells both sexual and non-sexual materials, it is a general video store with an adults-only section, consisting of a minority of its floor space. This is likewise is not a "new adult use." It is a genre of entertainment that is common in every metropolitan area in the United States and has been common for years, if not decades. It was certainly a common form

of entertainment when Rochester enacted its zoning ordinance. Obviously, the reason general video stores with adults-only sections were not studied by any jurisdiction for "adverse secondary effects," has nothing to do with the newness of the form of entertainment; it has to do with the virtually universal recognition that such establishments carry no more threat of adverse secondary effects than do "single adult use" theaters involved in Pringle, supra; and Tollis, supra.

The Eighth Circuit's narrow and myopic decision is directly contrary to persuasive decisions from other jurisdictions, including state courts of last resort.
See, for example, Richardson v. Wile, 535 A. 2d 1346 (Del. 1988); Worldwide Video v. City of Tukwila, 117 Wash. 2d 382 (1991), cert. denied, _____ U.S. ___, 112 S.Ct. 1672, 118 L.Ed. 2d 391 (1992); Sebago, Inc. v. City of Alameda, 211 Cal. App 3d (1989), rev. denied, (Cal. 1989); and Wolff v. City of Monticello, 803 F. Supp. 1568 (D. Minn. 1992). This Court should grant certiorari to resolve these conflicting decisions.

III. CERTIORARI MAY BE GRANTED, NOTWITHSTANDING THE PRELIMINARY NATURE OF BOTH THE DISTRICT COURT AND THE EIGHTH CIRCUIT DECISIONS.

To be sure, both the District Court's decision and the Eighth Circuit decision dealt only with the granting or denial of a preliminary injunction, not a final decision on the merits, and, to be sure, there is a preference in appellate courts, including this Court for reviewing final, rather than interlocutory decisions. However, there are at least three reasons for granting review of the present order.

First of all, such review is clearly permitted under Section

1254(1), in which this Court is granted jurisdiction to review all decisions of the United States Courts of Appeals, notwithstanding their interlocutory or final nature. It is plainly a power which this Court has exercised in the past. See, for example, Doran v. Salem, Inn, Inc., 422 U.S. 922 (1975); Coleman v. Paccar, Inc., 424 U.S. 1301 (1976); City of Los Angeles v. Lyons, 461 U.S. 95 (1983); and Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986).

Secondly, it should be noted in the instant case that Respondents sought appellate review of the granting of the preliminary injunction only on the issue of the likelihood that Petitioners would prevail on the merits, and the reversal was based solely upon the court's determination of the merits. See 25 F. 3d at 1415 - 1416, Appendix at A-137. Consequently, the Eighth Circuit's decision is solely one on the merits of Petitioners' constitutional claim, and that claim will be presented just as clearly now as it would be after entry of final judgment in the case.

Finally, and most importantly, the granting of the preliminary injunction was necessary for the preservation of First Amendment rights, a compelling concern in reviewing any grant or denial of a preliminary injunction. See Doran v. Salem, Inn., Inc., supra, Elrod v. Burns, 427 U.S. 347 (1976); and Dombrowski v. Pfister, 380 U.S. 479 (1965).

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted, and the decision of the Eighth Circuit reversed.

Dated: September 20, 1994.

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

ILQ Investments, Inc., a
Minnesota corporation,
and Excalibur Group, Inc., a
Minnesota corporation,
Plaintiffs,

vs.

City of Rochester, a
municipal corporation,
Defendant.

COMPLAINT

File No.

The above-named Plaintiffs, for their complaint against Defendant, hereby allege the following:

JURISDICTION

1. The jurisdiction of this Court is invoked under the laws of the United States and in particular, Title 28 U.S.C. Sections 1343(3), 2201 and 2202; Title 42 U.S.C. Section 1983, and the Constitution of the United States, in particular, under the First, Fourth and Fourteenth Amendments thereto, this being an action unauthorized by law to redress the deprivation, under color of state law, statute, ordinance, regulation, custom and usage of rights, privileges, and immunities guaranteed to Plaintiff under the Constitution of the United States. Jurisdiction is also invoked under the doctrine of supplemental jurisdiction, as set forth in Title 28 U.S.C. Section 1367(a).

PARTIES

2. Plaintiff ILQ Investments, Inc., is a corporation organized under the laws of the State of Minnesota. It owns real property in Rochester, Minnesota, located at 220 S.W. 1st Street.

3. Plaintiff Excalibur Group, Inc., is a corporation organized under the laws of the State of Minnesota. It is the tenant of Plaintiff ILQ Investments, Inc., at the building located at 220 S.W. 1st Avenue in Rochester, Minnesota. It does business as "Downtown Book and Video" at that location.

4. Defendant City of Rochester is a municipal corporation organized under the laws of the State of Minnesota.

FACTUAL BACKGROUND

5. At all times pertinent to this lawsuit, Plaintiff Excalibur Group, Inc., as a tenant of Plaintiff ILQ Investments, Inc., has operated a business entitled "Downtown Book and Video" at 220 S.W. 1st Avenue, Rochester, Minnesota. The business consists of the retail sale of books and magazines and the retail sale and rental of motion picture video tapes. As such, the business is entitled to protection under the First and Fourteenth Amendments to the United States Constitution.

6. On or about April 19, 1988, Defendant City of Rochester enacted Ordinance No. 2590, regulating the zoning of so-called "adult establishments" within the City of Rochester. A copy of the ordinance, which is currently in effect, is attached hereto as Exhibit A.

7. In enacting the above-described ordinance, Defendant City of Rochester acted under color of state law, statute, ordinance, regulation, custom and usage, within the meaning of Title 42 U.S.C. Section 1983.

8. Section 2 of the ordinance, codified in Rochester Code of Ordinances Section 60.4012, defines the term "adult bookstore" as follows:

> "A business engaging in the barter, rental, or sale of items consisting of printed matter, pictures, slides, records, audio tapes, video tapes or motion picture film, if such shop is

not open to the public generally but only to one or more classes of the public, excluding any minor by reason of age, or if a substantial or significant portion of such items are distinguished or characterized by an emphasis on the depiction or description of 'specified sexual activities' or 'specified anatomical areas.'

9. Section 5 of Ord. 2590, codified in Rochester Code of Ordinances at Section 60.4015 similarly defines the term "adult establishment" as follows:

"A business engaged in any of the following activities or which utilizes any of the following business procedures or practices; either:

a. Any business which is conducted exclusively for the patronage of adults and as to which minors are specifically excluded from patronage thereat either by law or by the operators of such business, except any business licensed under Chapter 125A of the Rochester Code of Ordinances;[1] or,

b. Any other business which offers its patrons services or entertainment characterized by an emphasis on matter depicting, exposing, describing, discussing or relating to specified sexual activities or specified anatomical areas.

Specifically included in the term, but without limitation, are adult bookstores, adult motion picture theaters, adult mini-motion picture theaters, adult massage parlors, adult saunas, adult companionship establishments, adult health

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[1] Chapter 25A of the Rochester Code of Ordinances relates to the licensure of the sale of liquor and non-intoxicating malt liquor. The exception is inapplicable to this lawsuit.

clubs, adult cabarets, adult novelty business, adult motion picture arcades, adult modeling studios, adult hotel or motel, and adult body painting studios."

10. The term "specified anatomical areas," referred to in both Sections 60.4012 and 60.4015, is defined in Section 16 of Ordinance No. 2590, codified in Rochester Code of Ordinances at Section 60.4642 as follows:

"Anatomical areas consisting of:

1. Less than completely and opaquely covered human genitals, pubic region, buttock, anus, or female breast(s) below a point immediately above the top of the areola; and,

2. Human male genitals in a discernably turgid state, even if completely and opaquely covered."

11. The term "specified sexual activities" referred to in both Sections 60.4012 and 60.4015 is defined in Section 17 of Ordinance No. 2590, codified in Rochester Code of Ordinances at Section 60.4643 as follows:

"Activities consisting of the following:

1. Actual or simulated sexual intercourse, oral copulation, anal intercourse, oral-anal copulation, bestiality, direct physical stimulation of unclothed genitals, flagellation or torture in the context of a sexual relationship, or the use of excretory functions in the context of a sexual relationship, and any of the following sexually-oriented acts or conduct: anilingus, buggery, coprophagy, coprophilia, cunnilingus, fellatio, necrophilia, pederasty, pedophilia, piquerism, sapphism, zooerasty; or

2. Clearly depicted human genitals in the state of sexual stimulation, arousal or tumescence; or

3. Use of human or animal ejaculation, sodomy, oral

copulation, coitus, or masturbation; or

4. Fondling or touching of human nude genitals, pubic region, buttocks, or female breasts; or

5. Situations involving a person or persons, any of whom are nude, clad in undergarments or in sexually revealing costumes, and who are engaged in activities involving the flagellation, torture, fettering, binding or other physical restraint or any such persons; or

6. Erotic or lewd touching, fondling or other sexually-oriented contact with an animal by a human being; or

7. Human excretion, urination, menstruation, vaginal or anal irrigation."

12. The locational requirements for adult businesses are set forth in Section 22 of Ordinance No. 2590, codified as Rochester Code of Ordinances Section 65.720 as follows:

"All adult establishment uses shall be located not less than 750 feet from any residential district boundary, from any church, from any school, or from any youth facility. In addition, no adult establishment use may be located within 750 feet of another adult establishment use. For the purposes of this Chapter this distance shall be a horizontal measurement from the nearest existing residential district boundary, church, youth facility or other adult establishment to the nearest point of the proposed adult establishment."

13. The term "youth facility" is defined in Section 18 of Ordinance No. 2590, codified as Rochester Code of Ordinances Section 60.4795, as, "A public playground, public swimming pool, public library, or licensed day care facility."

14. In late July, 1992, Plaintiff Excalibur Group, Inc., opened for business Downtown Book and Video at 220 S.W. 1st Avenue, in the building owned by Plaintiff ILQ Investments, Inc.

15. The business in question was primarily a general book and video store, with over 60 percent of its floor space devoted to the sale of books, magazines, and newspapers, and the rental of video tapes not characterized by an emphasis on either "specified anatomical areas" or "specified sexual activities," as defined in Rochester City Ordinance No. 2590.
All persons, regardless of age, were admitted to patronize this majority of floor space in the store.

16. A minority of floor space, approximately 40 percent, was devoted to the books, magazines, video tapes and other merchandise characterized by an emphasis on "specified anatomical areas" or "specified sexual activities," as defined in Ordinance No. 290. There is no on-premises consumption of sexually explicit entertainment. In order to comply with the provisions of Minnesota Statutes Section 617.293, Subd. 2(c), minors are excluded from the portion of the store in which sexually explicit materials are displayed or sold.

17. The store operated by Plaintiff Excalibur Group, Inc., in the building owned by Plaintiff ILQ Investments, Inc., is within 750 feet of the Rochester Public Library, a "youth facility" as defined in Rochester Ordinance No. 2590. However, the location is otherwise lawful for an adult use under the remaining provisions of the ordinance.

18. On August 7, 1992, ILQ Investments, Inc., was served with a notice of violation, a copy of which is attached hereto as Exhibit B, deeming Plaintiffs's premises an adult use under Ordinance No. 2590, and alleging that the location of said use violated the provisions of the ordinance. The notice demanded

discontinuance of the use within 5 days.

19. On the same day, Plaintiff ILQ Investments, Inc., received a second Notice of Violation, a copy of which is attached hereto as Exhibit C that the change of use to an adult use in the absence of a zoning certificate violated the Rochester Zoning Ordinance. The notice also demanded discontinuance of the use within 5 days.

20. Plaintiff ILQ Investments, Inc. proceeded to take timely appeals to both the Board of Zoning Appeals, and the City Council, as provided in the Rochester Zoning Code.

21. Plaintiffs' final appeal was resolved on November 2, 1992, when the Rochester City Council adopted Findings of Fact and Conclusions of Law, a copy of which is attached hereto as Exhibit D.

22. The Rochester City Council concluded that Plaintiffs' establishment was an adult use for the following reasons:

a. "By a preponderance of the evidence presented, the Common Council determined that ILQ operated the business located at 220 First Avenue S.W. as an adult bookstore on the basis that the bookstore is not open to the public generally but only to one or more classes of the public and does exclude any minor by reason of age." Conclusion of Law No. 5.

b. "By a preponderance of the evidence presented, the Common Council determined that ILQ operated the business at 220 First Avenue S.W. as an adult bookstore on the basis that a substantial or significant portion of the bookstore's items are distinguished or characterized by an emphasis on the depiction or description of 'specified sexual activities' or 'specified anatomical areas', as the latter terms are defined by the Rochester Zoning

Ordinance." Conclusion of Law No. 6.

c. "By a preponderance of the evidence presented, the Common Council determined that ILQ operated the business at 220 First Avenue S.W. as a business which offered its patrons services or entertainment characterized by an emphasis on matters depicting, exposing, describing, discussing, or relating to 'specified sexual activities' or 'specified anatomical areas,' as the latter terms are defined by the Rochester Zoning Ordinance." Conclusion of Law No. 7.

23. The City Council, in Conclusion No. 8, further concluded that the business operated unlawfully, in that it was within 750 feet of a public library.

24. As a result, the Notices of Violation were affirmed, and Plaintiffs ordered to cease within 5 days.

CAUSE OF ACTION - COUNT I

25. Plaintiffs re-allege the allegations set forth in Paragraphs 1-24, supra.

26. Rochester City Ordinance No. 2590 is unconstitutionally overbroad, both facially, and as applied to Plaintiffs, in violation of the First and Fourteenth Amendments to the United States Constitution, for the following reasons:

a. The ordinance was enacted in the absence of any empirical study or rational basis for believing that a business such as that operated by Plaintiffs, to-wit: a general retail bookstore and video store, with an adult section consisting of a minority of the floor space allotted, and featuring no on-premises consumption of sexually explicit materials, causes any adverse secondary affects justifying zoning regulation.

b. The ordinance, as construed by the Rochester City Council, making a store which sells any sexually explicit materials

an adult use for zoning purposes, impermissibly restrains First Amendment rights.

c. The ordinance, as construed by the Rochester City Council to mean that any business which excludes minors from any portion of the store constitutes an adult use, is unconstitutionally overbroad, serves no public purpose, and undermines the legitimate public interest in preventing minors from having access to sexually explicit materials.

d. The ordinance was enacted without any showing that the presence of a use such as that offered by Plaintiffs within 750 feet of a public library would cause any adverse secondary effects whatsoever.

COUNT II

27. Plaintiff re-alleges the allegations set forth in Count I, supra.

28. For the same reasons set forth in Count I, the provisions of Rochester City Ordinance Section 2590 also violate Article I, Section 3 of the Minnesota Constitution.

COUNT III

29. Plaintiffs re-allege the allegations set forth in Paragraphs 1-29, supra.

30. To the extent that Rochester Code of Ordinances Section 60.412 defines an adult bookstore as an establishment in which "a substantial or significant portion" of the items offered for sale or rental are sexually explicit, the ordinance is unconstitutionally vague, in violation of the First and Fourteenth Amendments to the United States Constitution.

COUNT IV

31. Plaintiffs re-allege the allegations set forth in Count III, supra.

32. For the same reasons as set forth in said count,

Rochester Ordinance No. 2590 also violates Article 1, Section 3 of the Minnesota Constitution.

EQUITY AND IRREPARABLE INJURY

33. Plaintiffs re-allege the allegations set forth in paragraphs 1-32, supra.

34. Under the provisions of Rochester Code of Ordinances Section 60.136, Plaintiffs face the possibility of criminal prosecutions, resulting in imprisonment for up to 90 days and fines of up to $700.00, for each day of operation in violation of the Rochester Zoning Code.

35. As a result, Plaintiffs are forced to the choice of foregoing rights guaranteed by the First and Fourteenth Amendments to the United States Constitution, and Article 1, Section 3 of the Minnesota Constitution, on the one hand, or, facing criminal prosecution on the other hand.

36. As a result, Plaintiffs face irreparable injury and have no adequate remedy at law, unless enforcement of Rochester City Ordinance Section 2590 against Plaintiff is temporarily and permanently enjoined.

WHEREFORE, Plaintiff requests the judgment and decree of this Court as follows:

a. That this Court enter a declaratory ordinance declaring Rochester Ordinance No. 2590 to be facially unconstitutional and unconstitutional as applied to Plaintiffs, as a violation of the First and Fourteenth Amendments to the United States Constitution, and Article 1, Section 3 of the Minnesota Constitution.

b. That this Court enter a preliminary and permanent injunction, and until a motion on a preliminary injunction can be heard, a temporary restraining order, restraining and enjoining Defendant, its officers, agents, and persons acting under its

direction and control, from taking any action, civil or criminal, to enforce the provisions of Rochester Code of Ordinances Section 2590 against Plaintiffs, or any persons acting under Plaintiffs' direction and control.

c. That this Court award to Plaintiffs their reasonable costs, disbursements, and attorney's fees, pursuant to Title 42 U.S.C. Section 1988.

d. That the Count grant such other and further relief as it may deem just, fair and equitable.

/s/

Randall D.B. Tigue
Attorney for Plaintiffs
2620 Nicollet Avenue
Minneapolis, Minnesota 55408

(612) 874-9903

Attorney Id. No. 110000

Dated: November 4, 1992.

VERIFICATION

STATE OF MINNESOTA)

)ss

COUNTY OF HENNEPIN)

Jerry L. Buchanan, being first duly sworn on oath, hereby deposes and says that he is the President of Plaintiff ILQ Investments, Inc., that he has read the foregoing Complaint, and that the allegations contained therein are true, except as to those matters stated upon information and belief and that, with respect to such matters, he believes them to be true.

/s/

Jerry L. Buchanan

Sworn to and subscribed to before me
this 5th day of November, 1992.

/s/

Notary Public

RANDALL D.B. TIGUE
Notary Public
Ramsey County
My Commission expires 1-29-96

VERIFICATION

STATE OF MINNESOTA)

ss)

COUNTY OF HENNEPIN)

Dennis G. Buchanan, being first duly sworn on oath, hereby deposes and says that he is the President of Plaintiff Excalibur Group inc., that he has read the foregoing Complaint, and that the allegations contained therein are true, except as to those matters stated upon information and belief and that, with respect to such matters, he believes them to be true.

/s/

Dennis G. Buchanan

Sworn to and subscribed to before me
this 5th day of November, 1992.

/s/

Notary Public

Marilee Kaeder
Notary Public - Minnesota
Ramsey County
My Commission Expires 1-29-96

ORDINANCE NO. 2590

AN ORDINANCE RELATING TO ZONING; DEFINING AND RESTRICTING ADULT ESTABLISHMENTS; PROVIDING FOR DISTANCING REQUIREMENTS, DEFINITIONS, AND RESTRICTIONS OF SUCH ESTABLISHMENTS FROM RESIDENTIAL DISTRICTS AND OTHER USES; AMENDING ROCHESTER CODE OF ORDINANCES, SECTION 65.100, AND TABLE 3 AND 4 IN CHAPTER 65.

THE COMMON COUNCIL OF THE CITY OF ROCHESTER DO ORDAIN:

Section 1. The Rochester Code of Ordinances is amended by adding a section to read:

60.4011. ADULT BODY PAINTING STUDIO: An establishment or business which provides the service of applying paint or other substance whether transparent or nontransparent to or on the body of patron when such body is wholly or partially nude in terms of "specified anatomical areas."

Section 2. The Rochester Code of Ordinances is amended by adding a new section to read:

60.4012. ADULT BOOKSTORE: A business engaging in the barter, rental, or sale of items consisting of printed matter, pictures, slides, records, audio tapes, video tapes or motion picture film, if such shop is not open to the public generally but only to one or more classes of the public, excluding any minor by reason of age, or if a substantial or significant portion of such items are distinguished or characterized by an emphasis on the depiction or

description of "specified sexual activities" or "specified anatomical areas.

Section 3. The Rochester Code of Ordinance is amended by adding a new section to read:

60.4013. ADULT CABARET: An establishment which provides dancing or other live entertainment, if such establishment excludes minors by virtue of age (except any business licensed under Rochester Code of Ordinance Chapter 125A) or if such dancing or other live entertainment is distinguished or characterized by an emphasis on the performance, depiction or description of "specified sexual activities" or "specified anatomical areas."

Section 4. The Rochester Code of Ordinances is amended by adding a new section to read:

60.4014. ADULT COMPANIONSHIP ESTABLISHMENT: A companionship establishment as defined in Rochester Code of Ordinances, Section 105.01 which excludes minors by reason of age, or which provides the service of engaging in or listening to conversation, talk or discussion between an employee of the establishment and a customer, if such service is distinguished or characterized by an emphasis on "specified sexual activities" or "specified anatomical areas."

Section 5. The Rochester Code of Ordinances is amended by adding a new section to read:

60.4015. ADULT ESTABLISHMENT: A business engaged in any of the following activities or which utilizes any of the following business procedures or practices; either:

a. any business which is conducted exclusively for the patronage of adults and as to which minors are specifically excluded from patronage thereat either by law or by the operators of such business, except any business licensed under Chapter 125A of the Rochester Code of Ordinances; or,

b. any other business which offers its patrons services or entertainment characterized by an emphasis on matter depicting, exposing, describing, discussing or relating to specified sexual activities or specified anatomical areas.

Specifically included in the term, but without limitation, are adult bookstores, adult motion picture theaters, adult mini-motion picture theaters, adult massage parlors, adult saunas, adult companionship establishments, adult health clubs, adult cabarets, adult novelty businesses, adult motion picture arcades, adult modeling studios, adult hotel or motel, and adult body painting studios.

Section 6. The Rochester Code of Ordinances is amended by adding a section to read:

60.4016. ADULT HOTEL OR MOTEL: Adult hotel or motel means a hotel or motel from which minors are specifically excluded from patronage and wherein material is presented which is distinguished or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas.

Section 7. The Rochester Code of Ordinances is amended by adding a new section to read:

60.4017. ADULT MASSAGE PARLOR, HEALTH CLUB: A massage parlor as required to be licensed by Rochester Code of Ordinances, Chapter 115 or health club

which restricts minors by reason of age, and which provides the services of massage, if such service is distinguished or characterized by an emphasis on "specified sexual activities" or "specified anatomical areas."

Section 8. The Rochester Code of Ordinances is amended by adding a new section to read:

60.4018. ADULT MINI-MOTION PICTURE THEATRE: A business premises within an enclosed building with a capacity for less than 50 persons used for presenting visual media material if such business as a prevailing practice excludes minors by virtue of age, or if said material is distinguished or characterized by an emphasis on the depiction or description of "specified sexual activities" or "specified anatomical areas" for observation by patrons therein.

Section 9. The Rochester Code of Ordinances is amended by adding a section to read:

60.4019. ADULT MODELING STUDIO: An establishment whose major business is the provision, to customers, of figure models who are so provided with the intent of providing sexual stimulation or sexual gratification to such customers and who engage in specified sexual activities or display specified anatomical areas while being observed, painted, painted upon, sketched, drawn, sculptured, photographed, or otherwise depicted by such customers.

Section 10. The Rochester Code of Ordinance is amended by adding a section to read:

60.40191. ADULT MOTION PICTURE ARCADE: Any place to which the public is permitted or invited wherein

coin or slug-operated or electronically, electrically or mechanically controlled still or motion picture machines, projectors or other image-producing devices are maintained to show images to five or fewer persons per machine at any one time, and where the images so displayed are distinguished or characterized by an emphasis on depicting or describing sexual activities or specified anatomical areas.

Section 11. The Rochester Code of Ordinances is amended by adding a new section to read:

60.40191. ADULT MOTION PICTURE THEATERS: A business premises within an enclosed building with a capacity of 50 or more persons used for presenting visual media material if said business as a prevailing practice excludes minors by virtue of age, or if said material is distinguished or characterized by an emphasis on the depiction or description of "specified sexual activities" or "specified anatomical areas" for observation by patrons therein.

Section 12. The Rochester Code of Ordinances is amended by adding a section to read:

60.40193. ADULT NOVELTY BUSINESS: A business which has as a principle activity the sale of devices which stimulate human genital or devices which are designed for sexual stimulation.

Section 13. The Rochester Code of Ordinances is amended by adding a new section to read:

60.40194. ADULT SAUNA: A sauna as defined in Rochester Code of Ordinances, Chapter 115, which excludes minors by reason of age, or which provides a steam bath or heat bathing room used for the purpose of

bathing, relaxation, or reducing utilizing steam or hot air as a cleaning, relaxing or reducing agent, if the service provided by the sauna is distinguished or characterized by an emphasis on "specified sexual activities" or "specified anatomical areas."

Section 14. The Rochester Code of Ordinances is amended by adding a new section to read:

60.4155. CHURCH: A building or structure, or group of buildings or structures, which by design and construction are primarily intended for the conducting of organized religious services and associated accessory uses.

Section 15. The Rochester Code of Ordinances is amended by adding a new section to read:

60.4615. SCHOOL: A public school as defined in Minnesota Statutes, Section 120.05 or a non-public school as defined Minnesota Statutes, Section 123.932.

Section 16. The Rochester Code of Ordinance is amended by adding a new section to read:

60.4642. SPECIFIED ANATOMICAL AREAS: Anatomical areas consisting of:

1. Less than completely and opaquely covered human genitals, pubic region, buttocks, anus, or female breast(s) below a point immediately above the top of the areola; and,
2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

Section 17. The Rochester Code of Ordinances is amended by adding a new section to read:

60.4643. SPECIFIED SEXUAL ACTIVITIES: Activities consisting of the following:

1. Actual or stimulated sexual intercourse, oral

copulation, anal intercourse, oral-anal copulation, bestiality, direct physical stimulation of unclothed genitals, flagellation, or torture in the context of sexual relationship, or the use of excretory functions in the context of sexual relationship, and any of the following sexually-oriented acts or conduct: anilingus, buggery, coprophagy, coprophilia, cunnilingus, fellatio, necrophilia, pederasty, pedophilia, piquerism, sapphism, zooerasty; or

2. Clearly depicted human genitals in the state of sexual stimulation, arousal or tumescence; or
3. Use of human or animal ejaculation, sodomy, oral copulation, coitus, or masturbation; or
4. Fondling or touching of nude human genitals, pubic region, buttocks, or female breast; or
5. Situations involving a person or persons, any of whom are nude, clad in undergarments or in sexually revealing costumes, and who are engaged in activities involving the flagellation, torture, fettering, binding or other physical restraint or any such persons; or
6. Erotic or lewd touching, fondling or other sexually-oriented contact with an animal by a human being; or
7. Human excretion, urination, menstruation, vaginal or anal irrigation.

Section 18. The Rochester Code of Ordinance is amended by adding a new section to read:

60.4795. YOUTH FACILITY: A public playground, public swimming pool, public library, or licensed day care

facility.

Section 19. The Rochester Code of Ordinances, Section 65.100 is amended to read as follows:

65.100. PURPOSES - COMMERCIAL DISTRICTS: The commercial districts are established to accomplish the general purpose of the zoning code and for the following specific purposes:

a. To group compatible business uses which will tend to draw trade that is mutually interchangeable and so promote business prosperity and public convenience.

b. To encourage adequate parking and loading, pedestrian circulation and amenity and the master planning and development of business districts.

c. To separate from residential districts and in certain cases from each other, certain commercial uses which have been determined to contribute to a "skid row" or blighting development pattern in adjacent areas.

Section 20. The Rochester Code of Ordinances is amended by adding a new section to read as follows:

65.6095. ENTERTAINMENT, ADULT: Adult bookstores, adult motion picture theaters, adult mini-motion picture theaters, adult massage parlors, adult saunas, adult companionship establishments, adult health clubs, adult cabarets, adult novelty businesses, adult motion picture arcades, adult modeling studios, adult hotel or motels, adult body painting studios, and other adult establishments.

Section 21. Rochester Code of Ordinances, Chapter 65, Table 3, entitled "Non-Residence Districts Land Use Regulations",

is amended by adding into the use category "entertainment" the number ".095" in each of the B-2, B-3, B-4, M-1, M-2 District columns designated herein.

Section 22. The Rochester Code of Ordinances is amended by adding a new section to read as follows:

> 65.720. LOCATION: All adult establishment uses shall be located not less than 750 feet from any residential district boundary, from any church, from any school, or from any youth facility. In addition, no adult establishment use may be located within 750 feet of another adult establishment use. For purposes of this Chapter this distance shall be a horizontal measurement from the nearest existing residential district boundary, church, school, youth facility or another adult establishment to the nearest point of the proposed adult establishment.

Section 23. Rochester Code of Ordinances, Chapter 65, Table 4, entitled "Schedule of Non-Residence Districts - Area, Bulk, Placement, Regulations, and Required Conditions", is amended in the "Required Conditions" section, in the column designated as "Location", by adding the number "(20)" in each of the B-2, B-3, B-4, M-1, and M-2 District columns..

Section 24. This Ordinance shall be in affect from and after its publication.

PASSED AND ADOPTED BY THE COMMON COUNCIL OF THE CITY OF ROCHESTER, MINNESOTA, THIS 18 DAY OF APRIL, 1988.

/s/
President of Said Common Council

ATTEST: /s/

Approved this 19 day of April, 1988.

/s/
Mayor of Said City

(Seal of the City of
Rochester, Minnesota)

ROCHESTER-OLMSTED
DEPARTMENT OF PLANNING
2122 Campus Drive SE
Rochester, MN 55904-4744
(507) 285-8232

DATE: August 7, 1992
VIOLATION NO.: 92-34
CERTIFIED MAIL RCPT. NO.: P 763 450 991

Notice of Violation Under the Rochester Zoning Ordinance and Land Development Manual

To: ILQ Investments Inc.
220 1 AVE SW
Rochester MN 55902

Dear Sirs:

You are hereby notified that your property at 220 1 Ave. SW, is being used in violation of Paragraph 63.252.9 of the Rochester Zoning Ordinance:
(Explain):
The use established (adult entertainment), violates site locational requirements of zoning ordinance. See attached copy of para. 63.252.9.

You are hereby requested to discontinue this violation within 5 days of the receipt of this NOTICE OF VIOLATION.

An appeal to this notice may be made in accordance with the provisions of Paragraph 60.700. Such an appeal must be filed within 10 days after the decision of the Zoning Administrator, Planning Director, or City Planning and Zoning Commission.

In the event that you fail to comply with this request, your case will be referred to the City Attorney for legal action. You are advised that violating any of the provisions of the Zoning Ordinance is a misdemeanor, and, as such, punishable by a fine of up to $700.00, or by imprisonment not to exceed 90 days, or both. Each and every day which such violation continues shall be deemed to be separate offense.

If you have any questions regarding this matter, please contact this office.

Respectfully,

/s/

Ronald Livingston
Zoning Administrator

DISTRIBUTION:

BEFORE THE COMMON COUNCIL
CITY OF ROCHESTER, MINNESOTA

In Re: Appeal #92-3 by ILQ Investments, Inc.	Findings of Fact, Conclusions of Law, and Order

On October 19, 1992, a public hearing was conducted, upon notice to the public, before the Common Council of the City of Rochester to hear the appeal of ILQ Investments, Inc., (hereinafter "ILQ") concerning a decision of the Zoning Board of Appeals.

On August 7, 1992, the Zoning Administrator caused a Notice of Violation Under the Rochester Zoning Ordinance And Land Development Manual to be served upon ILQ concerning property located at 220 First Avenue S.W., in Rochester, Minnesota. The Notice of Violation alleged that the above-located property was being used in violation of ROCHESTER, MINN., CODE ORDINANCES § 63.252(9)(1992). Specifically, the Zoning Administrator alleged that the property located at 220 First Avenue S.W. was owned and operated by ILQ and was an adult entertainment use and was located within 750 feet of a youth facility.

Thereafter, ILQ filed an appeal to the Zoning Board of Appeals pursuant to R.C.O. §60.700. On October 14, 1992, the Zoning Board of Appeals modified the decision of the Zoning Administrator. As modified, the Board upheld the decision. Thereafter, ILQ filed an appeal to the Common Council pursuant to R.C.O. §60.733. At the hearing, the ILQ's attorney spoke in favor of the appeal.

Based upon the evidence presented at the hearing, the Common Council of the City of Rochester does hereby make the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. This appeal is properly before the Common Council pursuant to R.C.O. §60.733.

2. For some time prior to August 6, 1992, the main floor of the building located at 220 1st Avenue S.W. was used as a business known as China Hall, which was engaged in the retail sales of china, crystal, pottery, glassware, and tabletop supplies.

3. On or about August 6, 1992, the Zoning Administrator learned that the building located at 220 First Avenue S.W., previously occupied by China Hall, was called Downtown Book and Video. Thereafter, the main floor of the building located at 220 First Avenue S.W. was altered to accommodate the sale of books and magazines in the front portion of the building and the sale of adult magazines and books, adult sexual novelties, and the sale or rental of adult-oriented videos in the rear portion of the building.

4. The rear portion of the building was open only for adults. Access to the rear portion of the business was restricted by a doorway and a hallway. A sign, which read "Adults Only" was posted adjacent to the doorway.

5. The rear portion of the building displayed materials, in the form of books and magazines, which displayed and depicted "specified sexual activities" and "specified anatomical areas", as the later terms are defined by the Rochester Zoning Ordinance.

6. According to a report submitted by the Zoning Administrator, approximately 75% of the rear portion of the building displayed items for sale designated as adults only.

7. ILQ's counsel stated that about 460 square feet of the main floor of the building located at 220 First Avenue S.W. was not devoted to books and magazines which displayed and

depicted "specified sexual activities" and "specified anatomical areas", as the latter terms are defined by the Rochester Zoning Ordinance.

9. ILQ's counsel stated that the sale of books and magazines which displayed and depicted "specified sexual activities" and "specified anatomical areas", as the latter terms are defined by the Rochester Zoning Ordinance, accounted for fifty percent of the total dollar sales of merchandise.

10. ILQ's counsel stated that about 40% of the floor space of the business located at 220 First Avenue S.W. offered its patrons services or entertainment characterized by an emphasis on matter depicting, exposing, describing, discussing, or relating to specified sexual activities or specified anatomical areas.

11. ILQ's counsel stated that the building located at 220 First Avenue S.W. was within 750 feet of the Rochester Library.

12. Section 60.200 of the Rochester Zoning Ordinance defines "adult bookstore" as a business engaging in the barter, rental, or sale of items consisting of printed matter, pictures, slides, records, audiotapes, video tapes or motion picture film, if such shop is not open to the public generally but only to one or more classes of the public, excluding any minor by reason of age, or if a substantial or significant portion of such items are distinguished or characterized by an emphasis on the depiction or description of "specified sexual activities" or "specified anatomical areas."

13. Section 60.200 of the Rochester Zoning Ordinance defines an "adult establishment" as a business engaged in any of the following activities or which utilizes any of the following business procedures or practices:

a. any business which is conducted exclusively for the patronage of adults and as to which minors are

specifically excluded from patronage thereat either by law or by the operators of such business, except any business licensed under Chapter 125A under the Rochester Code of Ordinance; or

b. any other business which offers its patrons services or entertainment characterized by an emphasis on matter depicting, exposing, describing, discussing, or relating to specified sexual activities or specified anatomical areas.

14. Section 60.200 of the Rochester Zoning Ordinance defines "specified sexual activities" to mean activities consisting of the following:

a) Actual or simulated sexual intercourse, oral copulation, anal intercourse, oral-anal copulation, bestiality, direct physical stimulation of unclothed genitals, flagellation or torture in the context of a sexual relationship, or the use of excretory functions in the context of a sexual relationship, and any of the following sexually-oriented acts or conduct: anilingus, buggery, coprophagy, coprophilia, cunnilingus, fellatio, necrophilia, pederasty, pedophilia, piquerism, sapphism, zooerasty; or

b) Clearly depicted human genitals in the state of sexual stimulation, arousal or tumescence; or

c) Use of human or animal ejaculation, sodomy, oral copulation, coitus, or masturbation; or

d) Fondling or touching of nude human genitals, pubic region, buttocks, or female breasts; or

e) Situations involving a person or persons, any of whom are nude, clad in undergarments or in

sexually revealing costumes, and who are engaged in activities involving the flagellation, torture, fettering, binding or other physical restraint of any such persons; or

f) Erotic or lewd touching, fondling, or other sexually-oriented contact with an animal by a human being; or

g) Human excretion, urination, menstruation, vaginal or anal irrigation.

15. Section 60.200 of the Rochester Zoning Ordinance defines "specified anatomical areas" to mean anatomical areas consisting of:

a) Less than completely and opaquely covered human genitals, pubic region, buttock, anus, or female breast(s) below a point immediately above the top of the areola; and

b) Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

16. The Zoning Administrator concluded that the building located at 220 First Avenue S.W. was engaged in an adult entertainment use. The basis for the Zoning Administrator's decision was the fact that the business constituted and adult bookstore as it was not open to the public generally, but only to one or more classes of the public excluding any minor by reason of age.

17. On August 7, 1992, the Zoning Administrator caused a Notice of Violation to be served upon ILQ alleging that ILQ had changed the use of the building located at 220 First Avenue S.W. to an adult entertainment use although the building is located a distance of less than 750 feet from the Rochester Public Library.

18. The Zoning Board of Appeals concluded that the business was open to the public generally and did not exclude any minor by reason of age. As a result, the Board did not agree with the basis for the Zoning Administrator's decision.

19. However, the Zoning Board of Appeals determined that ILQ operated the business located at 220 First Avenue S.W. as an adult bookstore on the basis that a substantial or significant portion of the bookstore's items are distinguished or characterized by an emphasis on the depiction or description of "specified sexual activities" or " specified anatomical area", as the latter terms are defined by the Rochester Zoning Ordinance.

20. Furthermore, the Zoning Board of Appeals determined that ILQ operated the business located at 220 First Avenue S.W. as a business which offered its patrons services or entertainment characterized by an emphasis on matter depicting, exposing, describing, discussing, or relating to "specified sexual activities" or "specified anatomical areas", as the latter terms are defined by the Rochester Zoning Ordinance.

CONCLUSIONS OF LAW

1. This appeal is properly before the Common Council pursuant to R.C.O. §60.733.

2. Section 60.764 of the Rochester Zoning Ordinance provides that the reviewing body may reverse or affirm, in whole or in part, or may modify the order, requirement, decision, or determination appealed from.

3. Section 63.252 (9) of the Rochester Zoning Ordinance requires an adult establishment use to be located not less than 750 feet from any youth facility.

4. Section 60.200 of the Rochester Zoning Ordinance defines "youth facility" to include a public library.

5. By a preponderance of the evidence presented, the

Common Council determined that ILQ operated the business located at 220 First Avenue S.W. as an adult bookstore on the basis that the bookstore is not open to the public generally but only to one or more classes of the public and does not exclude any minor by reason of age.

6. By a preponderance of the evidence presented the Common Council determined that ILQ operated the business located at 220 First Avenue S.W. as an adult bookstore on the basis that a substantial or significant portion of the bookstore's items are distinguished or characterized by an emphasis on the depiction or description of "specified sexual activities" or "specified anatomical areas", as the latter terms are defined by the Rochester Zoning Ordinance.

7. By a preponderance of the evidence presented, the Common Council determined that ILQ operated the business located at 220 First Avenue S.W. as a business which offered its patrons services or entertainment characterized by an emphasis on matter depicting, exposing, describing, discussing, or relating to "specified sexual activities" or "specified anatomical areas", as the latter terms are defined by the Rochester Zoning Ordinance.

8. By a preponderance of the evidence presented, the Common Council determined that ILQ operated that business located at 220 First Avenue S.W. at a location within 750 feet of a youth facility.

9. By a preponderance of the evidence presented, the Common Council determined that ILQ failed to produce substantial evidence or testimony showing that the Zoning Administrator's action in ensuing the Notice of Violation was in error or that the Zoning Board of Appeals' decision was in error.

10. By a preponderance of the evidence presented, the Common Council determined that the Zoning Board of Appeals'

basis for affirming the Zoning Administrator's issuance of the Notice of Violation should be modified, to reflect Conclusions of Law #5, but that otherwise there is no legal basis to reverse the decision of the Zoning Board of Appeals' affirmance of the Zoning Administrator's issuance of the Notice of Violation and that such decision, as modified, should be affirmed in its entirety.

ORDER

The Common Council of the City of Rochester, pursuant to R.C.O. §60.764, modifies the basis for the Zoning Administrator's Notice of Violation as follows:

1. ILQ operates the business located at 220 First Avenue S.W. as an "adult bookstore" on the basis that the business is not open to the public generally but only to one or more classes of the public, excluding any minor by reason of age.
2. ILQ operates the business located at 220 First Avenue S.W. as an "adult bookstore" on the basis that a substantial or significant portion of the items sold by the business are distinguished or characterized by an emphasis on the depiction or description of "specified sexual activities" or "specified anatomical areas", as the latter terms are determined by the Rochester Zoning Ordinance.
3. ILQ operates the business located at 220 First Avenue S.W. as an adult establishment on the basis that it offers its patrons services or entertainment characterized by an emphasis on matter depicting, exposing, describing, discussing, or relating to "specified sexual activities" or "specified anatomical areas", as the latter terms are defined by the Rochester Zoning Ordinance.

As modified, the Common Council does hereby affirm in its entirety the decision of the Zoning Administrator to issue the Notice of Violation in Appeal #92-3.

Dated at Rochester, Minnesota this ___ day of November, 1992.

_____

Nancy Selby
President of the Common Council
City of Rochester

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

ILQ INVESTMENTS, INC., a Minnesota corporation, and Excalibur Group, Inc.,a Minnesota corporation, Plaintiffs,	DEFENDANT'S ANSWER AND COUNTERCLAIM
vs.	File No. 3-92 CV 751 (RHK)
CITY OF ROCHESTER, a Minnesota municipal corporation, Defendant.	

The City of Rochester, for its answer to the Complaint on file in the above-entitled matter, states and alleges as follows:

1. Defendant denies each and every allegation of the Complaint, except as expressly admitted in this Answer.

2. Defendant admits the allegations contained in paragraphs 1, 2, 4, 6, 7, 8, 9, 10, 11, 12, 13, 18, 19, 20, 21, 22, 23, 24 and 34 of the Complaint.

3. With respect to the allegations contained in paragraph 3 of the Complaint, Defendant admits that, according to Olmsted County tax records, ILQ Investments, Inc. does business as "Downtown Book and Video" at the building located at 220 First Avenue S.W. in Rochester, Minnesota. Defendant is without knowledge or information concerning plaintiff Excalibur Group, Inc. and its relationship to Plaintiff ILQ Investments, Inc. and the Downtown Book and Video store.

4. With respect to the allegations contained in paragraph 5 of the Complaint, Defendant is without knowledge or

information concerning plaintiff Excalibur Group, Inc. and its relationship to plaintiff ILQ Investments, Inc. and the Downtown Book and Video store. Defendant admits that a business known as "Downtown Book and Video" operated at 220 First Avenue S.W. in Rochester, Minnesota at all times pertinent to this lawsuit. Otherwise, Defendant admits the truth of the remaining allegations in paragraph 5.

5. With respect to the allegations contained in paragraph 14 of the Complaint, Defendant admits that the Downtown Book and Video opened for business in late July, 1992 in the building located at 220 First Avenue S.W. in Rochester, Minnesota. Defendant is without knowledge or information concerning Plaintiff Excalibur Group, Inc. and its relationship to Plaintiff ILQ Investments, Inc. and the Downtown Book and Video store.

6. With respect to the allegations contained in paragraph 15 of the Complaint, Defendant admits that about 60% of the floor space, or about 720 square feet of the main floor of the business located at 220 First Avenue S.W., was devoted to books, magazines, newspapers and video tapes which are not characterized by an emphasis on either "specified anatomical areas" or "specified sexual activities", as the latter terms are defined by the City of Rochester Ordinance No. 2590. Defendant further admits that all persons, regardless of age, were admitted to this portion of the Downtown Book and Video.

7. With respect to the allegations contained in paragraph 16 of the Complaint, Defendant admits that about 40% of the floor space, or about 480 square feet of the main floor of the business located at 220 First Avenue S.W., was devoted to books, magazines, newspapers and video tapes which are characterized by an emphasis on either "specified anatomical areas" or "specified

sexual activities", as the latter terms are defined by the City of Rochester Ordinance No. 2599. Defendant further admits that minors are not admitted to this portion of the Downtown Book and Video store. Defendant is without knowledge or information sufficient to form a belief concerning the remaining allegations contained within paragraph 16.

8. With respect to the allegations contained in paragraph 17 of the Complaint, Defendant admits that the Downtown Book and Video store is within 750 feet of the Rochester Public Library, which is a "youth facility", as defined in City of Rochester Ordinance No. 2590, in violation of that ordinance. Defendant is without knowledge or information sufficient to form a belief concerning Plaintiff Excalibur Group, Inc. and its relationship to Plaintiff ILQ Investments, Inc. and the Downtown Book and Video store. Otherwise, Defendant admits the truth of the remaining allegations contained within paragraph 17.

AFFIRMATIVE DEFENSES

9. The Complaint fails to state a claim upon which relief can be granted.

10. The Plaintiffs have an adequate remedy at law.

11. The plaintiffs lack standing to challenge the constitutionality of Ordinance No. 2590.

12. The Complaint fails to state a justiciable controversy between the parties.

13. The Plaintiffs have an adequate state remedy available and have failed to exhaust that remedy.

COUNTERCLAIM FOR INJUNCTION
AND DECLARATORY RELIEF

For its Counterclaim against Plaintiffs, Defendant alleges as follows:

14. The business operated by Plaintiffs at 220 First

Avenue S.W. violates Ordinance No. 2590 and Section 61.111 of the Rochester Zoning Ordinance.

15. Plaintiffs contend that their business does not violate Ordinance No. 2590 or Section 61.111 of the Rochester Zoning Ordinance.

16. The City has suffered irreparable harm by the Plaintiffs' failure to comply with the City's ordinances.

17. The City is entitled to a declaratory judgment declaring that the Rochester Zoning Ordinance is constitutional and valid in all respects and is entitled to an injunction enjoining Plaintiffs from continuing to operate their business in violation of the City's zoning ordinance.

WHEREFORE, the Defendant prays for relief as follows:

1. That the Court issue an Order denying the relief sought by Plaintiff's Complaint and declaring the City of Rochester Ordinance No. 2590 to be constitutional in its entirety.

2. That the plaintiffs be enjoined from operating their business at their present location in violation of Ordinance No. 2590 and Section 61.111 of the Rochester Zoning Ordinance.

3. That the Defendant be awarded its costs and such other further relief to which the Defendant is entitled and that law, justice and equity require.

HOLMES & GRAVEN, CHTD

Dated: 12/8/92

/s/

James J. Thomson, #145300
470 Pillsbury Center
Minneapolis, MN 55402
(612) 337-9300

CITY OF ROCHESTER
TERRY L. ADKINS
CITY ATTORNEY

/s/

Terry L. Adkins, #215259
City Attorney
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CHAPTER I - INTRODUCTION

Several months ago the Rochester City Council expressed concern over the effect that adult bookstores located along South Broadway were having on other businesses in their neighborhood and the downtown area in general. This concern resulted in the Council's direction to staff to study the broader issue of adult entertainment uses, with emphasis on possible regulatory techniques to lessen the potential impacts of such businesses.

As indicated in the Glossary, the term "adult entertainment" as used in many zoning ordinances can encompass a broad range of uses. In addition to the so-called "sex businesses", the term can include pawn shops, bars and restaurants serving alcoholic beverages and pool halls. Our intention in this report has been to focus only on sexually oriented businesses.

Preparation of this report commenced with the assembly of studies which had been prepared by several cities throughout the nation. Those reports concentrated on the effects, both social and economic, that adult entertainment businesses have on surrounding neighborhoods. Research was also conducted into the legal issues associated with public regulation of such commercial uses. Federal and state cases reviewing a broad spectrum of regulatory approaches were examined.

This resulting report will provide a summarization of the studies reviewed and an overview of legal issues to establish parameters within which regulations may be adopted. It is intended to provide direction and information to assist you in examining this issue on behalf of the City.

March 2, 1988

CHAPTER II - LAND USE PERSPECTIVES OF ADULT ENTERTAINMENT

A. Authority to Regulate the Use of Property

For those less experienced in matters relating to land use issues and zoning we must begin with a brief examination of the evolution of these techniques. While the use of private property is a right protected by the United States Constitution, certain uses may be so detrimental that they must be controlled in order to protect the very right of the public to the enjoyment of their properties. The distinction between public and private nuisances provided the foundation upon which modern land use regulation was built.

During the first two decades of this century, zoning emerged as an accepted theory for restricting the use of private property without compensation for the taking of certain property rights. The essence of the theory of zoning was enunciated by the United States Supreme Court in Village of Euclid vs. Ambler Realty Co. (1926) The court held that zoning laws "must find their justification in some aspect of the police power, asserted for the public welfare". The court further stated that an ordinance would be judged unconstitutional if, "such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." In order to enhance the viability and desirability of neighborhoods, techniques were then developed to separate incompatible land uses from each other. The result produced social and economic benefits in the community.

During the last 60 years of zoning, refinements of the original concept of dividing a city into districts began to emerge. Among these was the realization that certain uses may have unsafe or undesirable effects if concentrated in too small of an area. One of the first groups of these uses was the category of establishments

which depended heavily on frequent ingress and egress of automobiles, a product of the era of drive-ins. In order to minimize conflicts with vehicular traffic it was considered desirable to separate auto service stations, drive-in restaurants and other similar establishments from one another.

These establishments were also often considered incompatible with the principle of preserving and stabilizing residential neighborhood values. The concept of separation and buffering evolved as ordinances were enacted requiring either specific distances between these uses and nearby residential zones, or the installation of walls and landscaping to reduce noise and to create an aesthetically pleasing appearance.

Because of an ever-increasing public awareness of potential environmental damages resulting from a wide range of land uses, commercial and manufacturing activities are often severely restricted in both location and performance. Many commercial uses may be restricted by location, in relation to other uses, in relation to other zones or land-use groups, and with respect to operating hours. For example the manufacture of dangerous or noxious substances are required to be distant from other sensitive areas, as are disposal sites for waste materials and many other problem uses.

Conflicts between uses are not limited only to physical characteristics of the land or business. They may also be the result of social concerns. It is well recognized that school children should be sheltered and protected from corrupting influences. For example, an establishment where alcoholic beverages are sold or consumed, is required by state statute to be a certain distance from a school or playground area, even though such establishments are a legitimate business for adult patrons.

B. Characteristics of Adult Entertainment Uses

Adult entertainment businesses prompt a wide range of

concerns, from offensive social behavior to the diminishment of the viability of commercial and industrial areas. Are these concerns real or perceived?

In order to determine if adult entertainment businesses affect an area it is first necessary to understand what these uses are and what characteristics they possess. While there are many different types of adult businesses, they have as their primary intention to sell or distribute products, materials or services to adults which relate to "specified sexual activities" or "specified anatomical areas" (see glossary for definition). These products take the form of books, magazines, video tape movies, closed circuit television, coin or electronically operated motion picture machines, motion picture theaters, live performances by entertainers and other service activities.

Each use in a city has unique characteristics which make that use distinguishable from any other use. While adult entertainment uses possess characteristics similar to other commercial uses, they seem to have additional characteristics which are unique. These include extended hours of operation, increased vehicular traffic, litter, noise, excessive signage, transient traffic and prostitution.

By contrast residential uses possess characteristics which are directly contrary to those of adult entertainment uses. These are limited traffic, stable population, cleanliness, quiet atmosphere, security, and openness.

An impact is then the effect of one set of characteristics conflicting with another.

It has been alleged that adult entertainment businesses have both direct and indirect impacts on surrounding properties and on adjacent neighborhoods. Direct impacts are the increased traffic, unusual hours of operation, increasing crime, litter and noise.

Indirect impacts include a reluctance of people to reside near the area due to the perception that adult businesses detrimentally affect the value of properties within and around the area. Another concern by residents, both residential and commercial, is the perception that criminal activities increased as a result of these uses locating in their neighborhoods.

The following chapter reflects attempts by several cities to determine what these impacts are.

Chapter III - SUMMARY OF STUDIES

In an effort to prove or dispel the perceptions that adult entertainment affects other uses in their neighborhoods, several cities have conducted studies of areas which presently contain adult businesses. These studies concentrated on changes in property values and crime rates as a base upon which to measure both the direct and indirect impacts of the neighborhood.

The study parameters established a "Control Area" and a "Study Area". The Study Areas chosen were areas which were generally adjacent to residential areas, contained land zoned commercial and contained at least one adult entertainment business.

Control Areas were then selected which had characteristics similar to the Study Areas. The Control Areas were also zoned commercially and were adjacent to residential areas but contained no adult entertainment business. In a further effort to make the areas as similar as possible, the Control Areas that were selected had a demographic similarity to the Study Area and contained buildings of a similar age and value as those in the Study Areas.

The importance of selecting areas with characteristics as similar as possible was to enable a realistic comparison of what is happening in both areas. If we make the assumption that adult entertainment uses have no effect on adjacent neighborhoods then the trends in property values and crime statistics should be similar

in both areas.

A copy of the complete reports is attached for your review.

A. Indianapolis, Indiana

In 1983 the Indianapolis Division of Planning undertook a study to determine what effect adult entertainment uses were having on crime rates and property values where they were located.

The study purpose was to consider the effect of adult entertainment by the analysis of: 1. crime reports provided by the Indianapolis Police Department (IPD) 2. the analysis of data reflecting the value of residential properties within 1000 feet of adult entertainment uses, and 3. the results of a random, national survey of the membership of the American Institute of Real Estate Appraisers.

1. Crime incidence:

   a) The average major crime rate (i.e. crimes per 10,000 population) was 748.55 in the IPD District, 866.34 in the Control Area, 1090.51 in the Study Area. In areas of the study that contained at least one adult entertainment establishment major crimes occurred at a rate that was 23% higher than the six Control Areas studied not having such businesses and 46% higher than the Police District at large.

   b) Although it was impossible to obtain a discrete rate for sex-related crimes at the police district level, it was possible to compare rates between the Control Area and the Study Area. The average sex-related crime rate in the Control Areas over the five year period was 26.2 , while that rate for the Study Areas was 46.4.

   c) If the ratio of sex-related crimes to major crimes

was the same between the Control Area and the Study Area, we would expect a sex-related crime rate of 32.3. The actual rate of 46.4 in the Study Area is 77% higher than that of the Control Areas rather than the 23% that would be expected. The result indicates the presence of abnormal influences in the Study Areas.

d) Close examination of crime statistics within the Study Areas indicate a direct correlation between crime and the residential character of the neighborhood. Crime frequencies were 56% higher the residential areas of the study than in the commercial areas.

e) Sex-related crimes occurred four times more frequently within residential neighborhoods having at least one adult entertainment business than within commercial neighborhoods having adult entertainment.

2. Real Estate Survey:

a) Although the housing base within the Study Areas was of a distinctly higher value than that of the Control Areas, its value appreciated at only one-half the rate of the Control Areas' and one-third the rate of the Center Township's as a whole during the period 1979-1982.

b) Pressures within the Study Areas caused the real estate market within their boundaries to perform in a manner contrary to that within the Control Areas, Center Township and the County. In a time when the market saw a decrease of 50% in listings, the number of listings within the Study

Areas actually increased slightly.

c) Twice as many houses were placed on the market at substantially lower prices than would be expected if the Study Area's market performance had been typical.

3. Results of Real Estate Appraisers Survey:

a) The great majority of appraisers (75%) who responded to a national survey of certified real estate appraisers felt that an adult bookstore located within one block would have a negative effect on the value of both residential and commercial properties. 50% of these respondents foresaw an its depreciation in excess of 10%.

b) At a distance of three blocks, the great majority of respondents (71%) felt that the impact of an adult bookstore fell off sharply so that the impact was negligible on both residential and commercial properties.

c) In anger to a survey question regarding the impact of an adult bookstore on property values generally, 50% felt that there would be a substantial-to-moderate negative impact, 30% saw little or no impact, and 20% saw the effect as being dependent on factors such as the predominant values (property and social) existing in the neighborhood, the development standards imposed on the use, and the ability of an existing commercial node to buffer the impact from other uses.

B. St. Paul, Minnesota (1978)

In 1978 the City of St. Paul conducted a study to determine the effects of adult entertainment businesses on neighborhood properties located nearby. The report utilized census information, residential property values and crime statistics between the years of 1970 and 1976. Even though the study was statistical in nature, correlations did provide circumstantial evidence of the relationship between adult entertainment and neighborhood deterioration. The study concluded:

1) The location of adult entertainment establishments correlates significantly (statistically speaking) with neighborhood deterioration.

2) Adult entertainment establishments tend to locate in somewhat deteriorated areas.

3) Additional relative deterioration of an area follows location of an adult entertainment business in the area.

4) Crime rates relate to establishment of adult entertainment businesses in a threshold fashion. There is a significantly higher crime rate associated with two or more such businesses in an area than is associated with only one adult entertainment business.

5) Housing value also relates to establishment of adult entertainment businesses in a threshold fashion. There is significantly lower value associated with three such businesses in an area than is associated with one or two adult entertainment businesses.

C. St. Paul, Minnesota (1987)

In 1987 the City of St. Paul again decided to look into the

adult entertainment issue. The purpose of this most recent inquiry was to determine if present ordinances were in need of amendment.

Although the purpose of the report was examine and analyze different strategies for using zoning in dealing with adult entertainment uses the report brought to light another concern - prostitution.

The report could not prove conclusively that adult entertainment uses were directly connected with or supportive of prostitution in the area. It did, however, point out the fact that prostitution was occurring at an alarming rate, intensity within a three block area surrounding one of St. Paul's most highly concentrated adult entertainment areas. The report alluded to a connection:

> "It is unclear to what extent clients of street prostitutes in this neighborhood are the same people as the patrons of the adult businesses in the neighborhood. Apparently, the two activities are often separate, but occur in the same neighborhood due to its 'sex for sale' reputation."

1) The report also documented that there had been an increase in crime in the area, according to police records.

2) The report also contained the results of a survey of St. Paul bank patrons asking their preference for a bank location and their perceptions of different locations. In response to the question "Are there any of these locations where you would not feel safe conducting your banking business?", 36% of the respondents said that they would feel unsafe banking at Dale and University (the area of St. Paul where the largest concentration of adult entertainment businesses is located).

D. Phoenix, Arizona

In 1979 the City of Phoenix, Arizona presented a study to determine if there was a relationship between arrests for sexual crimes and locations of adult businesses. This study used the method of establishing "Study" and "Control" areas for its analysis.

The following conclusions were offered:

1) There appears to be a significantly greater difference between the study and control areas for sex crimes than for either property or violent (other than sexual) crimes.

2) It is observed that there are about 40% more property crimes and about the same of rate non-sexual violent crimes per 1,000 persons in the Study Areas as compared to the Control Areas.

3) The sex crime rate in the Study Areas was an average of six times higher than the rate in the Control Area.

4) Where there is a concentration of adult businesses the difference in sex offense rates is most significant. Study Area 1 contained four (4) adult businesses less than 1,000 feet away from each other and less than 500 feet from a residential district. Study Areas II and III each contain a single adult business. In Study Area I there were a higher number of sex offenses committed - 84 more crimes than in Study Area II, and 56 more crimes than in Study Area III.

5) When compared to the Control Area, the sex crime rate per 1,000 residences was over 11 times greater in Study Area I. Within Study Areas II and III, the rates, respectively, are four and almost

three times as great as in the Control Area.

E. American Society of Planning Officials (ASPO) Report:

Also reviewed were reports prepared by various planning agencies. Of particular interest was a report published by the American Society of Planning Officials entitled "Regulating Sex Businesses". This report is attached for your review. It provides a broad overview of concerns, methods and techniques to be considered when contemplating regulation of adult entertainment businesses.

ADULT ENTERTAINMENT BUSINESSES IN INDIANAPOLIS AN ANALYSIS 1984

STUDY METHODS

As described below, the study methodology employs the comparison of different land areas in Indianapolis. The two basic areas of comparison are Study Areas and Control Areas. They are distinguished by the existence of adult entertainment establishments within their boundaries (the Study Areas) or the absence thereof (the Control Areas).

These two designations are further differentiated as to the general purpose or emphasis of the land uses they contain. Those that generally serve the immediately surrounding residential uses are termed "Neighborhood-Related" while those that contain uses meant to serve a broader geographic area are designated "Community-Related".

STUDY SITE LOCATIONS

At the time of the study's inception, there were at least forty-three possible, distinct sites in Indianapolis where adult entertainment was offered either singly or in clusters of establishments. For manageability purposes, it was decided to select six of these sites that were representative. In choosing these subject locations (as well as the Control Areas of the study),the determinant characteristics were their zoning mix, population size and the relative age of housing stock. In each case, adult entertainment was offered during the time span of the study.

The selection process was additionally based on the number of establishments located in a given neighborhood, whether it was residential in nature and therefore neighborhood-related, or contained a significant portion of its land use in regional,

commercial uses which made it community-related.

The designation "Neighborhood-Related" was applied where a preponderance (75% or more) of the area within 1000 feet of the site was zoned D1 through D12 (residential dwelling district classifications) and the commercial areas were neighborhood-related - principally C3 (a neighborhood commercial classification). Special Use designations were judged to be neighborhood-related or not on an individual basis. SUI (church) & SU2 (school), for example, were judged to be generally neighborhood-related.

"Community-Related" areas were described as areas where a significant proportion (30% or more) of the zoning within the 1000-foot radius was C4 (Community-Regional Commercial) or more intense and the Special Uses within the boundaries were of a community-wide nature. Su6 (hospital) and SU21 (cemetery) were judged, therefore, to be related to the community generally.

Within these two broad classifications, six locations were chosen. Two of them were situated in residential settings, two in regional-commercial settings and two in areas that fell in between, i. e., areas that had a high percentage of residential zoning but also contained a certain proportion of regionally oriented commercial zoning. These six locations became the Study Areas of this investigation. (cf. Appendix I).

AREA ZONING CHARACTERISTICS
STUDY AREAS

SITE	CHARACTERISTICS			
	Residential	Commercial	Special	Parks
Residential				
1.5431 East 38th St.	D4=82%	C1=7% C3=8%	SU1=3%	-
2.3155 East 10th St.	D5=75%	C3=24%	SU9=1%	-
Coml./Residential				
3.3555 West 16th St.	D5=78%	C4=22%	-	-
4.2101 W. Washington	D5=60%	C3=3% C4=18%	SU2=17%	PK1=2%
Commercial				
5.6116 E. Washington	D5=65% D8=5%	C4=30%	-	-
6.4441-63 N. Keystone	D5=15%	C2=5% C3=10% C5=40%	I1U=12% I2U=13%	PK2=5%

Of the two sites chosen in residential areas, one contained an adult bookstore (Apollo Adult Books, 5431 East 38th St.) and a massage parlor (Eve's Garden of Relaxation, 5429 East 38th St.) The other residential location contained an adult movie house (Rivoli Theater, 3155 East 10th St.) and a topless bar (Ten-De Club, 3201 East 10th St.)

One of the commercial/residential areas had a topless bar within its boundaries (Blue Moon Saloon, 2101 West Washington), while the other harbored the White Front Bar which featured topless dancing (3535 West 16th St.)

The two commercial areas chosen were in the sixty-one hundred block of East Washington St. and the forty-four hundred block of North Keystone. The first site contained two adult bookstores (Modern Art Bookstore at 6118 and Adult Arcade at 6122) and a massage parlor (Spanish Moon at 6116.) The North Keystone location contained four massage parlors (Other World, 4441, Diamond's Angels, 4445, Pleasure Palace, 4461, and Town

and Country, 4463), two adult bookstores (Video World, 4447 and Adult Bookstore, 4475) as well as a topless lounge (Devil's Hideaway, 4451).

Six areas were also selected to serve as control sites for the study. These sites were chosen on the basis of their proximate location to the Study Areas (or their location on major thoroughfares in areas physically similar in location and types of development), size of population and zoning characteristics. None contained adult entertainment businesses. Selection was also made so that two of the sites were in predominantly residential areas, two in commercial areas and two in areas that contained a significant mix of residential and regional commercial zoning. These six sites became the Control Areas of the study, (cf. Appendix I.)

AREA ZONING CHARACTERISTICS
CONTROL AREAS

SITE	CHARACTERISTICS			
	Residential	Commercial	Special	Parks
Residential				
1.2300 West 10th St.	D5=82%	C1=4% C3=14%	-	-
2.2500 East 10th St.	D5=80%	C2=12% C3=8%	-	-
Coml./Residential				
3.5420 E. Washington	D5=62% D6=8% D8=10%	C3=1% C4=19%	-	-
4.2600 W. Washington	D5=35% D4=34%	C1-2% C2=1% C5=13% C7=8%	SU1=3% SU2=3%	-
Commercial				
5.5200 N. Keystone	D2=7% D4=2% D5=15% D7=6%	C1=4% C3=9% C5=25% C7=20% C8=2%	IIU=10%	-
6.750 N. Shadeland	D2=3% D3=15% D7=3%	C4=49% C5=10% C8=5%	SU1=15%	-

EFFECTS ON SURROUNDING AREA OF ADULT-ENTERTAINMENT BUSINESSES IN SAINT PAUL

Division of Planning
Department of Planning and Economic Development
421 Wabasha Street
Saint Paul, Minnesota 55102
(612) 298-4510

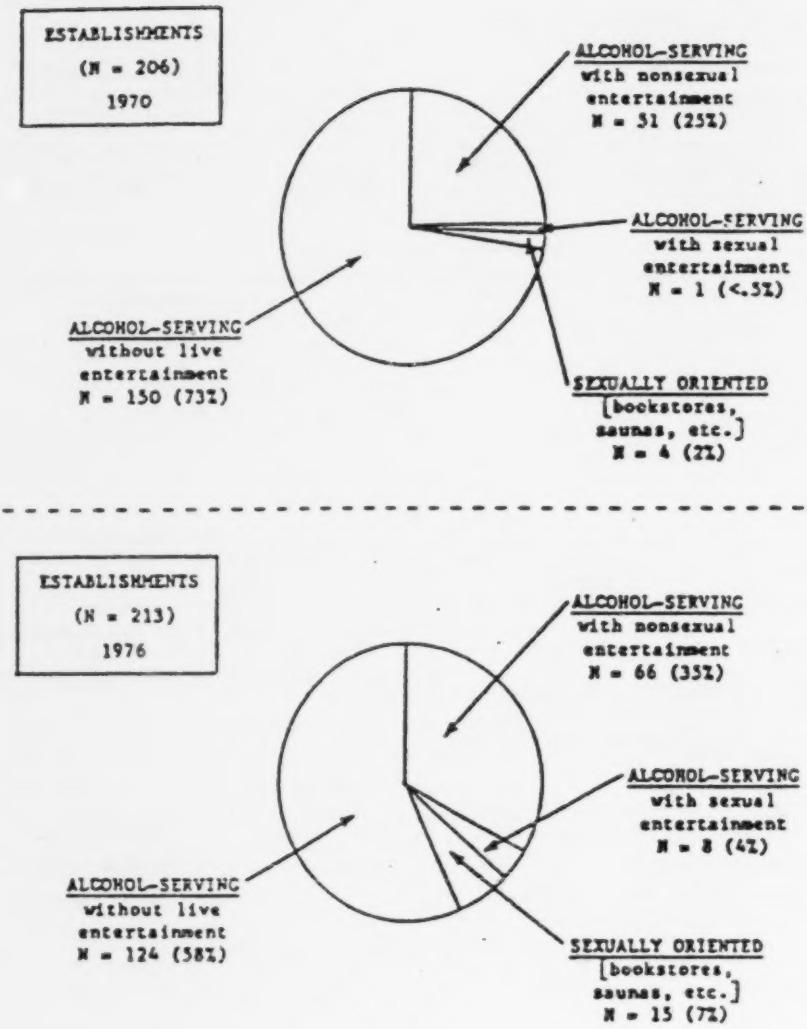
and the

Community Crime Prevention Project
Minnesota Crime Control Planning Board
444 Lafayette Road
Saint Paul, Minnesota 55101
(612) 296-3133

June 1978

FIGURE 1

ADULT ENTERTAINMENT ESTABLISHMENTS IN ST. PAUL
BY TYPE[a]



[a]The counts of adult entertainment establishments in this figure do not include those establishments located in the downtown St. Paul area (tract number 342).

TABLE 1

SUMMARY OF STAGE I:
Relationships between Adult Entertainment Establishments and Neighborhood Quality/Deterioration[a]

TYPE OF ADULT ENTERTAINMENT ESTABLISHMENT	1970 DETERIORATION and 1970 ESTABLISHMENTS	1976 DETERIORATION and 1976 ESTABLISHMENTS
ALL ESTABLISHMENTS: (alcohol-serving and sexually oriented combined)	Related	Related
ALCOHOL-SERVING:	Related	Related
Without entertainment licenses	Related	Related
With entertainment licenses	Marginally Related	Related
SEXUALLY ORIENTED	Not Related	Not Related

[a]The presence of relationships is statistically significant, $p \leq .05$.

TABLE 2

SUMMARY OF STAGE II:
Relationships between Adult Entertainment Establishments and Neighborhood Quality/Deterioration Controlled for Legal/Market Influences[a]

TYPE OF ADULT ENTERTAINMENT ESTABLISHMENT	1970 DETERIORATION and 1970 ESTABLISHMENTS	1976 DETERIORATION and 1976 ESTABLISHMENTS
ALL ESTABLISHMENTS: (alcohol-serving and sexually oriented combined)	Related	Related
ALCOHOL-SERVING:	Related	Related
Without entertainment licenses	Related	Related
With entertainment licenses	Not Related	Not Related
SEXUALLY ORIENTED	Not Related	Not Related

[a]The presence of relationships is statistically significant, $p \leq .05$.

TABLE 3

SUMMARY OF STAGE III:
Relationships between Adult Entertainment Establishments and Neighborhood Quality/Deterioration Across Time Controlled for Legal/Market Influences[a]

TYPE OF ADULT ENTERTAINMENT ESTABLISHMENT	1970 DETERIORATION and 1976 ESTABLISHMENTS	1970 ESTABLISHMENTS and 1976 DETERIORATION
ALL ESTABLISHMENTS: (alcohol-serving and sexually oriented combined)	Related	Related
ALCOHOL-SERVING:	Related	Related
Without entertainment licenses	Related	Related
With entertainment licenses	Not Related	Not Related
SEXUALLY ORIENTED	Not Related	Not Related

Although adult entertainment establishments tend to locate in already deteriorated neighborhoods, there is a stronger tendency for deterioration to follow the location of adult entertainment establishments.

[a]The presence of relationships is statistically significant, $p \leq .05$.

TABLE 4

SUMMARY OF STAGE IV:
Threshold Effects of Adult Entertainment Establishments on Neighborhood Quality/Deterioration[a]

TYPE OF ADULT ENTERTAINMENT ESTABLISHMENT	1970 DETERIORATION and 1970 ESTABLISHMENTS	1976 DETERIORATION and 1976 ESTABLISHMENTS
ALL ESTABLISHMENTS: (alcohol-serving and sexually oriented combined)	Threshold	Threshold
ALCOHOL-SERVING	Threshold	Threshold
SEXUALLY ORIENTED	No Threshold	No Threshold

[a]The presence of threshold effects is statistically significant, $p \leq .05$.

ADULT ENTERTAINMENT
1987

A 40-Acre Study
Prepared by the Division of Planning
Department of Planning and Economic Development
City Hall Annex
25 West Fourth Street
Saint Paul, Minnesota 55102

SCOPE OF STUDY

Saint Paul's Zoning Code currently defines "adult uses" to refer only to sex-related uses, not to alcohol-related uses:

> Adult uses are those uses excluding bars which are not open to the public generally but only to one or more classes of the public and excluding any minor by reason of age, a minor being a person under the age of eighteen years. Adult uses include, but are not limited to, adult bookstores, adult motion picture theatres, adult mini-motion picture theatres, adult massage parlors, adult saunas, adult rap/conversation parlors, adult health clubs, and adult cabarets, or similar adult uses.

Although this study considers possible amendments to the Zoning Code (including amendments to the definition of adult uses), the sex-related focus of the current definition will be retained. Alcohol-related uses are not included because problems associated with bars are often considerably different from the problems associated with sex-related businesses and are generally related to operation rather than to location. Licensing - not zoning - is the more appropriate way to regulate bars. There are sufficiently stringent licensing requirements for bars including distances from

schools, churches and other establishments with liquor licenses; operational procedures; City Council public hearings with mailed notice; and the possibility that the license may be revoked.

CURRENT REGULATION OF ADULT USES IN SAINT PAUL

Types and Locations of Adult Businesses

Depending on the system of categorization, there are at present either 14 or 19 adult entertainment establishments in Saint Paul. The Saint Paul Building Inspection and Design Division currently does not regard licensed bars as "adult uses," even if they offer sexually explicit live entertainment. There are five bars in Saint Paul offering such entertainment. There is also one business offering sexually explicit live entertainment which claims to be a private club open to minors as well as adults; however, Saint Paul's Building Inspection and Design Division categorizes it as an adult cabaret and thus is treating it as an illegal nonconforming use.

Appendix A contains a comprehensive list of the names and addresses of the 19 establishments. The categories for the establishments are as follows:

2 Movie Theatres

1 Bookstore

1 Adult Cabaret

10 Massage Parlors, Saunas, Health Clubs

5 Bars With Live Adult Entertainment

All of these businesses are within commercially zoned districts. Specifically, the zoning is as follows:

4 B-2 (Community Business District)

13 B-3 (General Business District)

1 B-4 (Central Business District)

1 CAAPB (Capitol Area Board) Jurisdiction

Seventy-nine percent (15 out of 19) of adult entertainment

establishments in Saint Paul are located on major thoroughfares: Arcade, Payne, Rice, Snelling, University and Seventh Street; the other 21 percent (4 out of 19) are on Grand, Hudson Road, Milton and Prior, which bear lower street classifications as minor arterials or collectors.

The total number of adult businesses has dropped to 19 from 30 in 1977 and 24 in 1982. The overall decline in number between 1977 and 1987 is a result of several factors. Some establishments were removed from the downtown area as a result of redevelopment in the area of the World Trade Center. Also, neighborhood pressure has resulted in the relocation or reorientation of several establishments. At the same time, zoning and licensing codes have become more restrictive, making it more difficult for new adult establishments to open. Finally, the recent increase in the popularity of home videotape players has apparently changed consumption patterns in a way that has diminished the demand for some forms of entertainment outside of the home.

SAINT PAUL -- RECENT PROBLEMS RELATED TO ADULT ENTERTAINMENT

Saint Paul has continued to experience social and economic problems related to adult entertainment. Essentially, these problems stem from prostitution which has been associated with adult entertainment in two ways. First, there have been persistent problems with street prostitution in the area of University Avenue and Dale Street. Secondly, there is strong evidence that prostitution sometimes occurs within Saint Paul's adult health clubs.

University-Dale Neighborhood Problems

In Saint Paul there is one neighborhood that has an especially heavy concentration of adult entertainment establishments. The blocks adjoining the intersection of University

Avenue and Dale Street have nearly 25 percent (4 out of 19) of the city's adult uses, including all of Saint Paul's adult bookstores and adult movie theatres. As in other American cities, the growth of adult entertainment in this neighborhood has accompanied significant social and economic decline.

The Thomas-Dale District (Citizen Participation District #7) is the district that has been most affected by adult entertainment in the Saint Paul. This district is generally bounded by University Avenue on the south, the Burlington Northern railroad tracks on the north, Interstate 35-E on the east and Lexington Parkway on the west. The neighborhood has suffered serious problems in recent years and is in many ways the most distressed neighborhood in the city. Indicators of distress in this neighborhood include the following:

- Highest unemployment rate in the city (1980: 9.6 percent vs. 4.7 percent in Saint Paul as a whole)
- Highest percentage of families below the poverty line (1979: 19.2 percent vs. 8 percent in Saint Paul as a whole)
- Lowest median family income (1979: $15,090 vs. $20,743 in Saint Paul as a whole)
- Lowest percentage of high school and college graduates (high school graduates in 1980: 52.6 percent vs. 72.4 percent in Saint Paul as a whole; college graduates in 1980: 5.7 percent vs. 19.8 percent in Saint Paul as a whole)

There is evidence that many of these problems are related to adult entertainment in the following way:

concentrations of certain types of adult
entertainment near residential areas
↓
street prostitution, potentially
dangerous patrons of adult businesses
↓
other crimes

QUESTION: ARE THERE ANY OF THESE LOCATIONS WHERE YOU WOULD NOT FEEL SAFE CONDUCTING YOUR BANKING BUSINESS?

		AGE OF RESPONDENT						
Location	Total	18-24	25-34	35-44	45-54	55-64	65+ over	dn't knw refused
Dale & University	36%	46%	32%	33%	46%	33%	38%	50%
Rice & University	4%	0	6%	0	0	4%	5%	0
University & Snelling	3%	0	7%	2%	0	2%	1%	0
Grand & Victoria	2%	4%	2%	0	0	2%	1%	0
Rice & Larpenteur	1%	0	0	2%	0	0	1%	0
None	52%	46%	50%	59%	54%	57%	47%	50%
Number of Responses	305	24	82	46	28	49	74	2

Prostitution and Adult Health Clubs

Prostitution problems in the University-Dale neighborhood are land use problems. That is, they occur on the streets outside of the adult businesses in the neighborhood. A different type of prostitution problem sometimes occurs within Saint Paul's adult health clubs.

Police in Saint Paul receive frequent complaints that adult health clubs in the city are fronts for prostitution. Until recently, this was difficult to prove because an arrest at one location seemed to activate a warning network which made it impossible to arrest violators of the law in other locations. On December 16, 1986, police confronted this situation with a simultaneous sweep of the ten adult health clubs in the city where prostitution was suspected. Because of the simultaneous nature of these actions, police were able to take action in nine of the ten raided clubs. According to Lieutenant James Frank, head of the police department's vice squad, "That makes it quite obvious that we do have a problem."

However, it is important to recognize the difference between the nature of prostitution associated with adult businesses in the University-Dale area and prostitution allegedly occurring in the adult health clubs scattered throughout the city. Street prostitution has an adverse impact on the neighborhood in which it occurs but it apparently is beyond the control of the adult businesses which are located in the neighborhood. Thus, a zoning remedy would seem appropriate for this type of problem. In the case of adult health clubs, there is little or no direct impact on the surrounding neighborhood but prostitution would seem to be controllable by the proprietors of the health clubs. Thus, a licensing remedy would be a more appropriate way to deal with this type of problem.

RELATION OF CRIMINAL ACTIVITY
AND ADULT BUSINESSES
Prepared by the City of Phoenix
Planning Department
May, 1979

ADULT BUSINESS STUDY

INTRODUCTION

A necessary premise for regulating adult businesses by zoning is that a land use relation or impact results from this form of business. Many zoning ordinances throughout the nation now have provisions based on one of two basic approaches to control the location of adult businesses. One approach, sometimes known as the Detroit Model, divides or prevents the concentration of adult businesses in an area. A certain distance from residential neighborhoods, churches, and schools is also maintained. Another approach, or the Boston Model, fosters the concentration of adult businesses in one area of the City.

The latter approach has resulted in the more noteworthy problems. For instance, in Boston's concentrated adult business area there is control of signs, upgrading of streets and sidewalks, renovation of store fronts, and even the construction of a new park. This scheme has not affected the high number of stabbings, murders, and muggings which take place in the district.

Also, at one time, New York City had concentrated adult business districts. However, the police department reported that crime complaints were almost 70% higher on police posts with adult businesses, as opposed to posts without them. The reports showed higher rates of rape, robbery and assault. In one adult business concentration around Times Square, sales taxes dropped by 43% in a two-year period, due to the loss of 2.5 times as many retail jobs as the rest of the City.

New York soon dropped its original adult business ordinance and adopted an amendment which was patterned after the Detroit model. The new ordinance also went one step further than any other in the nation when suggestion was made to amortize all nonconforming adult businesses within one year. Thus, up to 80% of the existing sex businesses were terminated.

In the Phoenix Zoning Ordinance an amendment concerning adult businesses became effective on November 8, 1977. It too is patterned after the Detroit model.

Briefly, the amendment in Section 417 states that:

1. No adult business is to be within 1,000 feet of any use in the same category.
2. An adult business is not permitted within 500 feet of a school or a residential zone unless approved by City Council and area residents. A petition which is signed by 51% of the residents in the 500-foot radius who do not object must be filed and be verified by the Planning Director. After the petition is completed the City Council may consider waiving the 500 foot requirement.

Adult businesses are being treated as a land use issue by their relationship to impacts on their surrounding properties and on adjacent neighborhoods. Are the crime impacts noted in Boston and New York's districts directly related to the adult business being there, or to some other societal variables in the neighborhood? Are they identifiable, and thus a probable cause for negative neighborhood reactions to nearby adult businesses?

The Phoenix Ordinance was based on two hypotheses: first, that there are direct impacts which uniquely relate to this class of land use; and second, that there are indirect, but equally potent, attitudinal concerns which result from proximity to an adult

business. Examples of the former are possible traffic congestion, unusual hours of operation, litter, noise, and criminal activity. Illustrating the latter is substantial testimony that has indicated that many neighborhood residents dislike living near an area containing an adult business. Also, financial institutions take nearby adult businesses into account when financing residential properties. Finally, people's perceptions of criminal activity is reinforced by a greater incidence of sexual crimes in areas or commercial districts containing adult businesses.

In this study we will show that there is a relationship between arrests for sexual crimes and locations of adult businesses. This relation will correlate with concerns which have been expressed by residents of nearby residential neighborhoods of the nature of crimes associated with adult businesses. Sex crimes appear to generate substantial fears for the safety of children, women, and neighborhoods in general. Their association with adult businesses generates negative images (as well as real or potential hazards) and results in a lowering of the desirability and livability of an impacted neighborhood.

This study specifically shows that there is a higher amount of sex offenses committed in neighborhoods in Phoenix containing adult businesses as opposed to neighborhoods without them. In this project three study areas were chosen -- neighborhoods with adult businesses, and three control areas -- neighborhoods without adult businesses which were paired to certain population and land use characteristics. The amount of property crimes, violent crimes, and sex offenses from the year 1978 are compared in each study and control area.

THE STUDY AND CONTROL AREAS

Three different study areas containing adult businesses were selected to collect crime data. The east side of Central

Avenue was chosen for the location of two study areas, while the west side has the third study area. Appendix I describes a more detailed process of how each study area was derived.

A control area has no adult business, but generally speaking, has similar population characteristics of a matched study area in terms of:

1. Number of residents
2. Median family income
3. percentage of non-white population
4 Median age of the population
5. percentage of dwelling units built since 1950
6. Percentage of acreage used residentially and non-residentially

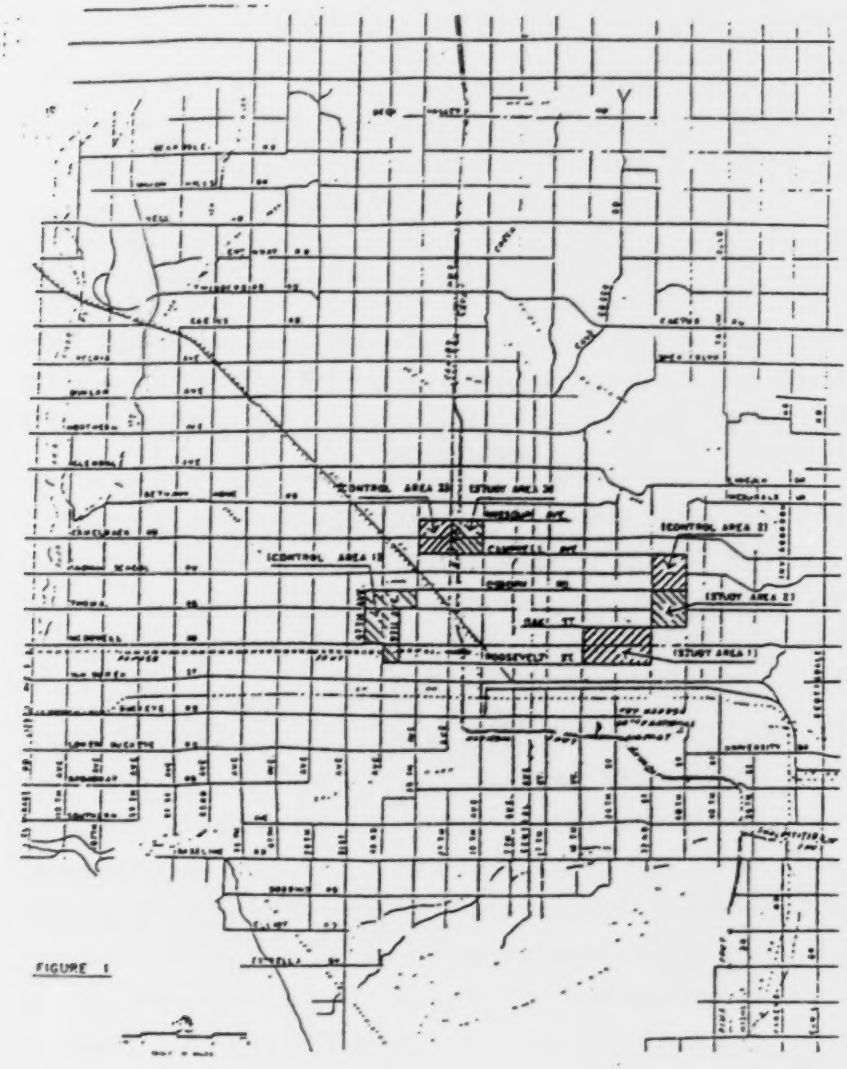
Appendix II states a more detailed process of how each control area was derived. Adult business locations are based on information furnished by the Phoenix Police Department and verified by the planning Department.

TABLE I

THE STUDY AND CONTROL AREA LOCATIONS

STUDY AREA	CONTROL AREA
STUDY AREA I Roosevelt St - Oak St 16th St - 32nd St	CONTROL AREA I Starting at 47th Ave, east on Osborn Rd, South on 35th Ave, west on Thomas Rd, South on 39th Ave, West on Roosevelt St, North on 43rd Ave, West on McDowell Rd, and North on 47th Ave, to the point of beginning.
STUDY AREA II Oak St - Osborn Rd 32nd St - 40th St	CONTROL AREA II Osborn Rd - Campbell Ave 32nd St - 40th St
STUDY AREA III Missouri Ave - Campbell Ave 19th Ave - 27th Ave	CONTROL AREA III Missouri Ave - Campbell Ave 27th Ave - 35th Ave

Figure 1, following shows the boundaries of the three study and control areas.



Study Area I contains two square miles and one of the City's larger concentrations of adult businesses. These locations are: 1702 E. McDowell Road; 2339 E. McDowell Road; 2438 E. McDowell Road, and 3155 E. McDowell Road.

The matching population characteristics of Study and Control Area I are listed below in Table II. (Appendix III provides a more detailed process of how this data was derived.)

TABLE II

Population Characteristics of
Study and Control Area I

	Study I	Control I
% Non-White	24%	24%
Building/ 1950-1970	57%	93%
Income	$7,675	$9,885
Median Age	29	26
Land Use -		
Commercial	31%	38%
Residential	69%	62%

The only substantial population characteristic differences in these two areas are in the age of homes built between 1950 and 1970. The concentrated adult business district has a little over half of its homes built after 1950. Whereas the control area has almost 93% of its housing built after 1950.

Study Area II is one square mile on the east side of the City, and contains only one adult business within the square mile, at 3640 East Thomas Road. Its control area is to the north side of the Study Area.

The comparison of population characteristics are shown in Table III.

TABLE III
Population Characteristics of
Study and Control Area II

	Study II	Control II
% Non-White	7.4	4.4
Building/ 1950-1970	88.0	92.5
Income	$10,779	$12,013
Median Age	36	38
Land Use -		
Commercial	18%	11%
Residential	82%	89%

Study Area III also contains one adult business at 2103 W. Camelback Road. It is one square mile located on the west side of the City. Its Control Area is directly to the west. The comparison of population characteristics are shown below:

TABLE IV
Population Characteristics of
Study and Control Area III

	Study III	Control III
% Non-White	8.2	8.8
Building/ 1950-1970	83%	93%
Income	$9,829	$10,559
Median Age	29	28
Land Use -		
Commercial	29%	28%
Residential	71%	72%

PROPERTY, VIOLENT, AND SEX CRIMES IN ADULT BUSINESS AREAS AND THEIR CONTROL AREAS 1978

	STUDY I		CONTROL I		STUDY II		CONTROL II		STUDY III		CONTROL III	
	#	#/1000 pop.*	#	#/1000 pop.*	#	#/1000 pop.*	#	#/1000 pop.*	#	#/1000 pop.*	#	#/1000 pop.
Property Crimes	1616	130.05	1176	88.48	753	107.5	363	62.2	780	125.8	575	116.8
Violent Crimes	89	7.16	66	4.96	21	3.0	21	3.6	39	6.29	36	7.3
Sex Offenses	127	10.22	12	.90	43	6.1	13	2.2	71	11.5	14	2.8
Rape	14	1.13	5	.38	5	.71	1	.17	5	.80	2	.4
Indecent Exposure	107	8.61	6	.45	37	5.3	10	1.7	60	9.7	9	1.8
Lewd & Lascivious	2	.16	0	0	1	.14	1	.17	4	.64	1	.2
Child Molest	4	.32	1	.08	0	0	1	.17	2	.32	2	.4

Property Crimes = Burglary, Larceny, Auto Theft

Violent Crimes = Murder, Rape, Robbery, Assualt

Sex Offenses = Rapes, Indecent Exposure, Lewd and Lascivious, Child Molest

* 1978 Estimates of population at the enumeration district level were derived by the Planning Department Research Section

CONCLUSIONS

Table V Property, Violent, and Sex Crimes in Selected Study Areas--1978[1] is a tabulation of the number of crimes committed and the rate of those crimes per 1,000 people living in each area. This table is on the following page.

There appears to be a significantly greater difference between the study and control areas for sex crimes than for either property or violent crimes. The following table illustrates a comparison of the ratio of the crime rate of the study area to the control area:

TABLE VI

Crime Rates as a Percentage of Study Area to Control Area

Study Area	Property Crimes	Violent Crimes	Sex Crimes	Sex Crimes Less Indecent Exposure
I	147%	144%	1135%	358%
II	173	83	277	160
III	108	86	405	178
Ave-rage	143%	104%	606%	232%

It is observed that there are about 40% more property crimes and about the same rate of violent crime: per 1,000 persons in the Study Areas as compared to the Control Areas.

On the other hand there is an average of six times the sex crime rate in the Study Areas as compared with the Control Areas. Although the majority of sex crimes are Indecent Exposure, the fourth column illustrates that the remainder of the sex crimes also

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[1] Table V Property, Violent, and Sex Crimes in Selected Study Areas--1978, was derived from information provided by the City of Phoenix Police Department's Crime Analysis Unit and Planning and Research Bureau. The date from these two sections was compiled by adding the number by type of crimes committed in police grids, which are quarter mile neighborhoods. Crimes are based on arrest records and do not reflect ultimate convictions. It has been assumed that conviction rates will be proportional to arrest rates.

exhibit a significantly higher rate in, the study areas. A detective from the police department stated that most indecent exposure crimes were committed on adult business premises. An example of this finding is in Study Area I. In that location, 89%. of the reported indecent exposure crimes were committed at the addresses of adult businesses.

Where there is a concentration of adult businesses, such as in Study Area I, the difference in sex offense rates is most significant. As stated earlier in the report this location has four adult businesses which are less than 1000 feet away from each other and less than 500 feet away from a residential district. There is also a higher number of sex offenses committed -- 84 more crimes than in Study Area II, and 56 more crimes than in Study Area III. Similarly, when compared to its Control Area, the sex crime rate, per 1,000 residences is over 11 times as great in Study Area I. In the remaining study areas, which each contain a single adult business, their rates are four and almost three times as great.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

ILQ Investments, Inc., a Minnesota Corporation, and Excalibur Group, Inc., a Minnesota corporation, Plaintiffs, vs. City of Rochester, a municipal corporation, Defendant.	AFFIDAVIT OF RANDALL D.B. TIGUE File No.

STATE OF MINNESOTA)
)ss
COUNTY OF HENNEPIN)

Randall D.B. Tigue, being first duly Sworn on oath, hereby deposes and says the following:

1. Your affiant is the attorney for Plaintiffs in the above-entitled matter.

2. As such, your affiant represented Plaintiffs in their administrative appeals of the notices of zoning violation before the Rochester Board of Zoning Appeals and the Rochester City Council.

3. On both occasions, your affiant requested of the Board Of Zoning Appeals and the Rochester City Council that if they deemed Plaintiffs' present percentage of adults-only material for sale or rental to be "substantial and significant" within the meaning of Ordinance No. 2590, to provide your affiant with specific information as to what percentage would not be deemed "substantial or significant," so that Plaintiffs could place

themselves in compliance with the ordinance.

4. On neither occasion did either the Board of Zoning Appeals or the City Council make the slightest attempt to define the word "substantial or significant" or to advise your affiant as to what percentage of sexually explicit materials Plaintiffs would be permitted to carry in their store, without placing themselves in violation of the ordinance.

5. Your affiant has also examined the legislative history of the enactment of Ordinance No. 2590, in particular, the empirical data relied upon by the Rochester City Council in enacting the ordinance, in terms of whether adults uses cause adverse secondary effects.

6. Attached hereto as Exhibit A is that portion of the planning report given to the Rochester City Council, in which empirical studies with respect to adverse secondary effects were contained.

7. The Indianapolis study referenced in Paragraph A of Exhibit A refers to a study entitled "Adult Entertainment Businesses in Indianapolis," a copy of which is attached hereto as Exhibit B.

8. The study referred to in Paragraph B, of Exhibit A, concerning St. Paul, Minnesota, refers to a 40-acre study entitled "Adult Entertainment Study," a copy of which is attached hereto as Exhibit C.

9. The study referred to in Paragraph C of Exhibit A is a supplement to the original study, a copy of which is attached hereto as Exhibit D.

10. A copy of the American Society of Planning Officials Support, referred to in Paragraph E of Exhibit A is attached hereto as Exhibit E.

11. The Examination of all of said studies would

reveal that all of said studies dealt exclusively with business establishments which provided entirely adult entertainment, and also provided for on-premises consumption of sexually explicit materials, either through motion picture theater viewing, "peep shows," or live nude dance entertainment.

12. None of the studies in question dealt with general video stores, containing adults-only sections, which provided for exclusively off-premises consumption of sexually explicit material.

13. Your affiant executes the attached affidavit in support of the attached Motion for Preliminary Injunction.

/s/
Randall D.B. Tigue

Sworn to and subscribed before me this
6th day of November, 1992.

/s/
Notary Public

Marilee Kaeder
Notary Public - Minnesota
Ramsey County
My commission expires 1-29-96

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

ILQ Investments, Inc., a Minnesota corporation, and Excalibur Group, Inc., a Minnesota corporation,

Plaintiffs,

vs.

City of Rochester, a municipal corporation,

Defendant.

AFFIDAVIT OF DENNIS BUCHANAN

File No. 3-92 cv 751 (RHK)

STATE OF MINNESOTA)
)ss
COUNTY OF HENNEPIN)

1. Your affiant is the President of both ILQ Investments, Inc., and Excaliber Group, Inc., the two Plaintiff corporations in the above-entitled matter.

2. Your affiant is also a part owner of Broadway Books, an Adult Bookstore located within the City of Minneapolis.

3. Your affiant has been in the adult bookstore business for at least nine years.

4. As such, your affiant has personally visited more than 70 adult bookstores in 25 cities, throughout the United States and overseas.

5. Your affiant has read the letter of James Thomson, Attorney for Defendant City of Rochester, dated February 17, 1993, addressed to the Honorable Richard Kyle, Judge of United States District Court.

6. In that letter, Mr. Thomson apparently attempts to dispute the fact that none of the studies relied upon by the City of Rochester dealt with the establishments which feature only take-home merchandise, rather than on-premises consumption. In doing so, Mr. Thomson relies upon the fact that the City's planning study included studies from Indianapolis and St. Paul, which studied "adult bookstores," the implication being that "adult bookstores" are uses which features only take-home merchandise.

7. The assumption is absolutely false.

8. Any essential component of every adult bookstore which your affiant has either operated or visited including those in Indianapolis and in St Paul, which are among the stores that your affiant has personally visited, has been on-premises viewing booths, otherwise known as "peep shows," in which customers, usually for a coin deposit, watch adults-only motion picture films or video tapes in private booths. These "peep shows" are an absolute essential component of every adult bookstore your affiant has ever operated or visited.

9. In fact, your affiant has never seen, either in the United States or in a foreign country, an adult bookstore which did not contain "peep shows" or other forms of on-premises consumption of sexually explicit material.

10. By contrast, Downtown Book and Video is not an adult bookstore. It is a general video store, which also sell books and magazines. It has an adults-only section.

11. There is, however, no on-premises consumption, either by theaters, peep shows, or live entertainment.

12. To suggest as Mr. Thomson's letter does, that this operation is even remotely similar to "adult bookstores" studied in either Indianapolis or St. Paul, is absolutely false.

/s/

Dennis Buchanan

Sworn to and subscribed before me this
17th day of February, 1993.

/s/

Notary Public

Marilee Kaeder
Notary Public
Ramsey County
My Commission expires 1-29-96

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

ILQ Investments, Inc.,

Plaintiff,

vs. 3-92 Civ 751

City of Rochester, February 18, 1993
St. Paul, Minnesota

Defendants.

TRANSCRIPT OF PROCEEDINGS
MOTIONS

BEFORE THE HONORABLE RICHARD H. KYLE
UNITED STATES DISTRICT COURT JUDGE

Robert W. Riley
500D U.S. Courthouse
316 N. Robert St.
St. Paul, Minnesota 55101

Transcript of proceedings had in the above-entitled matter before the Honorable Richard H. Kyle, one of the judges of the above court, Courtroom No. 1, U.S. Courthouse, St. Paul, Minnesota, February 18, 1993.

APPEARANCES

On behalf of the Plaintiff:

Tigue Law Office
2620 Nicollet Ave
Minneapolis, MN 55408
by Randall D. B. Tigue, Esq.

On behalf of the Defendant:

Holmes & Graven
470 Pillsbury Center
Minneapolis, MN 55402
by James J. Thomson, Esq.

and;

Terry Lee Adkins
Rochester City Attorney
City Hall Rm 1
224 1st Ave SW
Rochester, MN 55902

* *

THE COURT: Why don't we get the appearances of counsel who are here? We will hold off, obviously, for a few minutes until Mr. Tigue gets here.

MR. THOMSON: Jim Thomson appearing on behalf of the defendant. Terry Adkins is the city attorney for Rochester.

THE COURT: And Mr. Tigue is here. The record should show that Mr. Tigue is also present, together with Mr. Thomson and Mr. Adkins.

The matter on the calendar this morning is the plaintiff's motion for preliminary injunction. For the benefit of counsel I have had an opportunity to review the file in the matter, including the briefs which have been filed in support of and in opposition to the motion, and the letters which followed the briefing by the

parties, so I think I am up to date as to the status and what's before the Court.

I mention that so that in your argument this morning, you can assume that I have a pretty good familiarity with the factual background of the case, as well as the arguments which have been submitted in written form. So, Mr. Tigue, are you prepared to proceed then?

MR. TIGUE: Yes, sir. Your Honor, before I proceed with oral argument, late yesterday I received a fax from Mr. Thomson containing an argument that I think has a factual assumption in it that is untrue, and in response thereto I faxed an affidavit of Dennis Buchanan to Mr. Thomson. The clerk's office advised me that if I wasn't a government agency, they would not accept a fax from me. So I do have an affidavit, two copies from Mr. Buchanan, that I think responds at least to one factual point in Mr. Thomson's letter.

THE COURT: By Mr. Thomson's letter you're referring to his letter dated the 17th?

MR. TIGUE: The 17th, yesterday. And I received it late yesterday afternoon, prepared and had a responsive affidavit signed, and unfortunately the clerk's office would not accept it by fax and it was to late to get it over here.

THE COURT: Well, we have it now.

MR. TIGUE: I will refer to it at the appropriate place in the argument. I think, Your Honor, what we have to begin with is looking -- there are essentially three ways one can become an adult use under the Rochester ordinance and I would like to examine each of them.

One is that if you are a business that offers services or entertainment characterized by an emphasis on specified sexual acts or specified anatomical areas, you are an adult business. The other

is if you exclude minors because of age, you are an adult business. And third, if a substantial or significant portion of your stock in trade is in sexually explicit materials, you are an adult business. I'd like to examine those three definitions one by one.

THE COURT: Is there any question about the first two applying to your client?

MR. TIGUE: Well, I guess--

THE COURT: Or within the definition --

MR. TIGUE: I think he is within the definition of the first two. But I think the first one is important especially because of what the city concedes and that is, it says -- it's important to know what the ordinance does not say is that a business that emphasizes specified sexual areas or specified anatomical areas is an adult business. It says if you offer entertainment or services characterized by a emphasis. So if you offer a single videotape characterized by an emphasis of sexual explicitness, you become an adult book store or an adult use under the ordinance.

As I pointed out, those kinds of definitions have been universally invalidated and the city's only response to it is, one, they said the ordinance doesn't mean what it says. Emphasis means what the business emphasized, not what the services or entertainment emphasize, even though the ordinance says exactly to the contrary. I think that's important because it carries with it an implicit concession that the city is constitutionally mandated to permit the plaintiffs to have some sexually explicit materials available for sale or rental, notwithstanding an adult entertainment zoning ordinance.

Given that concession, I would suggest the invalidity of the remainder of the ordinance becomes apparent, because when you look at the other two definitions with that concession in mind, the invalidity is clear. And let's look at the first of the other two

ways. You must exclude minors because of age. Now, it's important to note that within the framework of this particular definition, the amount of sexually explicit material you have is irrelevant. It could be 50 percent or one percent or one videotape or one magazine

THE COURT: It's up to the store owner to make that decision.

MR. TIGUE: It's up to the store owner to make that decision, but the only difference is the way in which you market it. If you market it in such a way that you exclude minors from having access to the sexually explicit material, you are subject to the restrictions of the ordinance. If you permit minors to have access to the sexually explicit materials, if you mix "Debbie Does Dallas" and "Deep Throat" in with your Walt Disney movies and let minors have access to them, you are outside the framework of the ordinance.

THE COURT: But you are within the framework of some other statutes, aren't you?

MR. TIGUE: You are within the frameworks of some other statutes if you either display it to the minors or you permit the minors to purchase. You could put a screen over it and just make sure the minors don't buy it, but you allow minors to have access to where it is. My clients don't want to do it. They would rather have the minors not be in the same room as the sexually explicit materials.

And let's take a look at how that plays out in terms of the justification of the ordinance. The only reason my client is in violation of this ordinance is that my client is within 750 feet of the Rochester Public Library, which this ordinance deems a youth facility. So obviously the purpose of this distance requirement is to put a distance between sexually explicit entertainment and

facilities patronized by youth. Let's take a look at what this ordinance says. If my client were to permit minors to have access to sexually explicit materials, mix "Debbie Does Dallas" and "Deep Throat" with the Walt Disney movies and mix Hustler magazine in with the Mickey Mouse Club magazines and let minors have access to where they are, he can locate next to a grade school and it wouldn't make any difference. He would be legally permitted to do so consistent with this ordinance.

If, on the other hand, he behaves responsibly and says minors cannot be in the same room with the sexually explicit material, he has got to be 750 feet away from the public library. The other curious part of this is the notion of the library in the first instance. As I pointed out in the original memorandum, libraries are exempted from the state law provisions about distributing sexually explicit materials to minors. So if, for instance, the Rochester Public Library were to obtain, as many public libraries have, a copy of Madonna's book Sex with its sexually explicit photographs and suggestions, consistent with Minnesota law any 15-year-old could borrow that from the Rochester Public Library.

By contrast, my client not only wouldn't distribute that book to a 15-year-old, he wouldn't let the 15-year-old in the same room in which that book is being distributed. And yet somehow, some public purpose is supposed to be served by making this facility be 750 feet away from a facility in which sexually explicit materials can be borrowed lawfully.

In all of the memoranda to the Court, the defendant has yet to advance a word of explanation for justification for any of these things, and it certainly isn't preventing minors from having access to sexually explicit materials, because it's absolutely clear the ordinance does nothing but undermine that, because it says if you permit minors to have access, you don't have to comply with the

ordinance. Only if you deny access to minors do you fall within its provisions.

We then come, I think, to the crux of the argument, which is the constitutional justification for adult entertainment zoning in the first instance. Adult entertainment zoning is an exception to the general rule of the First Amendment, which is that you cannot consist with the First Amendment discriminate on the basis of the content of protected speech. It's as absolute a bar as there exists in the law. Adult entertainment zoning was created as an exception to that and a very narrow and limited exception, and that is because certain types of sexually explicit entertainment have been shown to cause adverse secondary effects. Then it's necessary and permissible to zone that, not for the purpose of regulating the content, but for the purpose of regulating the adverse secondary effects. And an absolutely necessary corollary to that is you cannot zone beyond that which causes adverse secondary effects. There must be a rational relationship between your zoning regulations and the secondary effects you are trying to prevent.

Let's look at the distinction this ordinance draws. This ordinance does not draw a distinction between a use which offers sexually explicit materials and those that do not. This ordinance in this provision distinguishes only between those uses which offer sexually explicit materials and deny minors access to those materials on the one hand and those uses which allow access to sexually explicit materials, but permit minors to have access.

You've got several pages of document studies and council minutes and you will find not one word in any of them from any study anywhere in the United States of America that says that distinction has the least bit of relation to adverse secondary effects. Is there any crime, any urban blight, any deterioration of property values associated with businesses that offer sexually explicit

material, but deny minors access to those materials, and those types of businesses that offer sexually explicit materials and permit minors to have access? Absolutely not. The distinction is absolutely unrelated to any of the constitutional justifications for adult entertainment zoning.

But above and beyond that, Your Honor, even if you got beyond that definition, I think both the facts and the law are clear that the type of use this is, which is a general video store with an adults only section in it, minors being denied access, that is exclusively take home merchandise and not on premises consumption of the material, has never been shown to cause an adverse secondary effect anywhere.

THE COURT: Your position is that the studies that the city relied upon-- Phoenix, Indianapolis, St. Paul --basically have no application to the situation?

MR. TIGUE: That's correct, but in every one of them -- and this is where Mr. Buchanan's affidavit is important, because Mr. Thomson's letter to you contains a faulty assumption and faulty premise that says that these all dealt with adult bookstores, that shows that it deals with take home merchandise and not on premises entertainment. As Mr. Buchanan's affidavit points out, every book store in America, every adult book store in America, including those in Indianapolis and St. Paul, which Mr. Buchanan has personally visited, has as a prominent feature of the services it offers the video peep shows, coin operated, sexually explicit motion pictures. You go into a booth, you put some coins in a slot and you watch movies. That is a prominent feature of virtually every adult bookstore in America, certainly every one in Indianapolis, St. Paul and all of the studies that they have relied upon.

I think, Your Honor, if you want to take a look at what

classic secondary effects theory is is look to Defendant's Exhibit 2, the 40-acre study of the city of St. Paul on page 19. They have a little chart on the bottom of the page and it says what -- the secondary effects occur like this. You have sexually explicit adult entertainment and that leads to street prostitution, that leads to other crime, that leads to deterioration of property values and urban blight. That's the classic secondary effects theory. And it is fundamentally premised on premises consumption of the material. In other words, you go watch your movie, be it in a theater or in a peep show, you get yourself sexually aroused, you are an eager customer for a prostitute out on the street, that leads to an increase in street prostitution around the facility, that leads to other prostitution related crimes, such as muggings and robberies and things link that, that increase in crime causes a deterioration of property values.

THE COURT: It's your position, I take it, that you can't apply that type of study to somebody who goes into your store, buys or rents a video tape-

MR. TIGUE: Takes it home and watch it there --

THE COURT: Hold it. Let me finish -- okay.

MR. TIGUE: That's what the Supreme Court of Washington said in the Tuckwila case -- that's the Village of Bellwood case that I cited you to -- that you have to have a reasonable basis for believing that the use you regulate is the type of use that causes the adverse secondary effects. There is no empirical evidence anywhere in the United States of America that even 100 percent adult material that features only take home merchandise causes adverse secondary effects, and certainly none that a general video store with an adults only room in the back, all of which is take home merchandise, causes adverse secondary effects. And that's essentially what Judge MacLaughlin found in

Wolff versus City of Monticello.

So where in fact you are regulating based upon content in the absence of evidence of adverse secondary effects, you are engaged in content based regulations and you are not narrowly tailoring your solution to the uses that caused the adverse secondary effects. With respect to the second definition, again the definition is absolutely unrelated to adverse secondary effects and secondly, it's being applied to a use that has never been shown to cause any.

The last area in which I want to deal with the merits is the final element of the definition, which is the substantial or significant. We have both cited to you cases in our respective memoranda as to why this is or is not unconstitutionally vague. Rather than repeat those, I would like to make a few fundamental, practical arguments.

In August of 1992, my clients were issued orders from the city of Rochester that said comply with this ordinance in five days. From day one they asked a simple question of the City of Rochester, "What do I do to comply?" The same question was asked at the Board of Zoning Appeals. Same question was asked at the city council. If 40 percent is too much under the substantial and significant, how do I do what you ordered me to do, which is comply with the ordinance? Zoning inspectors haven't given us an answer. The Board of Zoning Appeals haven't given an answer. City Council hasn't given us an answer. And in 30 pages of memo from Mr. Thomson and subsequent letters, they haven't attempted to give you an answer. I will make a prediction. By the end of the argument today, you still will not have heard an answer from Mr. Thomson, or if you have heard an answer, you will not have heard a justification for how he comes to that answer. If 40 percent is to much, what about 30 percent? What about 25? What

about 50? What about 20? How do you make a distinction under the substantial or significant language?

One of the cases I did cite to you was the original district court decision in Alexander versus City of Minneapolis, which was decided by your colleague, Judge Alsop. And I would suggest to you that two things I think swung Judge Alsop's mind. One, the zoning administrator testified and was asked, "What are your standards for determining what substantial or significant means?" And he said, "Well, I just walk into the store, eyeball it and if it looks substantial or significant to me, I issue a citation." Judge Alsop quite correctly said that that "I know it when I see it" kind of attitude appears to be the antithesis of due process of law and held the ordinance unconstitutionally vague. And that's precisely the posture the city of Rochester has taken since day one. We won't tell you what substantial or significant is, but we know it when we see it, and if you're over the line, we reserve the right to send you to jail for 90 days.

The other thing that I would suggest swung Judge Alsop's mind is in Alexander versus City of Minneapolis. The city of Minneapolis counterclaimed for an injunction enjoining Mr. Alexander from violating the ordinance. I said to Judge Alsop, "Your Honor, if you uphold this provision and you issue the injunction the city is asking for, it's going to be your job to enforce that injunction. What is substantial or significant that the zoning administrator has no idea and he knows it when he sees it and it's going to be your job to decide it. You are going to have set the standard." I think judge Alsop quite rightly decided that given the fact that he would have to set the standards and there were no standards being offered by the city at all as to what it meant, then he determined the ordinance unconstitutionally vague, and I think that's the likely disposition of this case, even though

the city has not counterclaimed to put you in that position in this case.

The last thing I want to talk about a little bit is the balancing of harms. The city has in fact offered no vision at all as to what would be harmful if this injunction were to issue. They have in fact voluntarily refrained from enforcing the ordinance. They have in fact offered no evidence that this particular use has caused or is causing any secondary effects and no evidence that any use like it has ever caused secondary effects anywhere in the United States of America.

On the other hand, as I pointed out in my memoranda, you are putting these plaintiffs to the test of foregoing the exercise of First Amendment rights on the one hand or facing criminal prosecution on the other. The United States Supreme Court has held that to irreparable injury as a matter of law.

But let me make one final argument that I didn't make in the memorandum. And that is I would suggest there is a harm to public interest for the plaintiffs being forced to comply with the ordinance above and beyond the loss of First Amendment rights. Assuming we have some standard of what substantial or significant is, the city has conceded that some sexually explicit material may be offered consistent with the ordinance, and if we have some kind of agreement on what substantial or significant is -- is it ten, 15, 20 percent? -- they are going to be able to offer that in the store. If they have to comply with the ordinance, they will be forced to let minors have access to that material, rather than doing what they're doing today and saying minors can't be in the same room with that material. And I think the courts have been legitimately concerned with keeping sexually explicit material from minors. That goal will be absolutely undermined if this injunction is denied, because what it will do is force the plaintiffs to do that

which they don't want to do, which is permit minors to have access to sexually explicit materials.

I told the Board of Zoning Appeals that if you want us to do that, we will do it, but we will do so reluctantly, because we believe the laws of the state of Minnesota and the legitimate public purposes are best served by doing precisely what these plaintiffs are doing, not only not letting minors have access to the material, but not letting them be in the same room with the material.

You will take away their ability to do that by denying this injunction. So I would suggest there's a strong likelihood the plaintiffs will prevail on the merits of this, and the balance of the harms and the public interest strongly favors allowing plaintiffs to continue to do what they're doing rather than doing what the city wants them to do, which is make this kind of material available to minors.

THE COURT: Thank you. Mr. Thomson?

MR. THOMSON: Thank you, Your Honor. May it please the Court. Let me first say, I think what we're here for this morning is a hearing on a preliminary injunction that the plaintiffs have brought. This isn't a trial on the merits. This is their motion for a preliminary injunction. First of all, let me go through quickly the three definitions, because there is obviously a misunderstanding between the parties as to what the ordinance does and doesn't permit.

There are three ways the ordinance can be violated. The first one is is it an adult book store, meaning is the shop open to the public generally? Our position in this case is that this business is not open to the public generally, because at least 40 percent of the floor area is not open to the public generally. It's that simple. That's why they come within that definition -- whether the plaintiffs are right on that or whether the city is right on that.

The second test is does the book store deal in items that have a substantial or significant portion of the items distinguished by adult material? Whether they come within the first prong of the definition, they clearly come within the second prong, and this argument that the city wants to have the operator allow minors access to the materials, I haven't understood that argument from day one. I don't understand it standing here today. That's not what the city wants. What the city is saying is if you come within either prong of this definition, you are an adult book store. And if a substantial or significant portion of the items that you sell at your book store depict adult material, it doesn't make any difference whether you segregate them in an area of the book store or disperse them throughout the book store and cover them up, which they have to do according to the minor statute. It doesn't make any difference. It's still an adult book store.

The third definition is a definition that an adult establishment is a business which offers its patrons services or entertainment characterized by an emphasis on matter depicting adult material. Now, apparently Mr. Tigue's argument is if we sell one book and that book is characterized by an emphasis on adult material, then we automatically become an adult establishment. Mr. Tigue was told at the city council hearing on the appeal that that's not what the ordinance means. What the ordinance says is the business which offers its patrons services or entertainment characterized by an emphasis. And the position of the city council at the hearing was that this business is characterized by an emphasis on adult material and that is virtually undisputed. Mr. Tigue acknowledged that 40 percent of the floor area and at least 50 percent of the volume of sales in the business is characterized by such items. I still don't understand that argument. It seems clear to me that under either one of the last two definitions, this is

an adult book store, an adult establishment. There may be some question in the first one as to whether or not it's open to the public generally, but our position is it isn't. But even if he is right on that, it clearly becomes an adult book store under the second two definitions.

Adult entertainment zoning is no more of an exception to the First Amendment than regulating billboards or regulating any other type of material that has First Amendment protection. Municipalities are allowed to do it. I think what's important today is to make sure we all understand what the law is as opposed to what plaintiff and their attorney believes what the law should be. There is a big difference there, because what the law is on that issue is City of Renton standard. The City of Renton has three prongs. One, you first look to determine whether the regulation is content neutral. The second is if it's content neutral, does it advance a substantial governmental interest? And number three, if it does, are there reasonable opportunities for communication? Number three is unchallenged in this case so I don't think we even need to address it.

This ordinance is clearly content neutral. It has been on the books for five years. There was a several-hundred-page study done by the city. There is not one shred of evidence before the Court that this ordinance was adopted for any purpose other than regulating secondary effects. So I submit to the Court that the first three issues are not issues, that the significant issue in this case is whether or not the regulation advances a substantial governmental interest.

THE COURT: The city didn't conduct any of its own studies, though?

MR. THOMSON: No, it did not. I will address that right now. The city did not do its own study. What it did is rely

on studies from Phoenix, Indianapolis, St. Paul, Minneapolis and a study prepared by America Planning Association Advisor Service. Now, I agree that that is the key issue in this case. Number one, Renton says you don't have to do your own study. You can rely on studies from your other city. In Renton they had a study. In Young they didn't. In Young they had one person, I think it was psychologist, testify and say these are the effects and they upheld that. The Court upheld that.

The second thing, you don't have to do your own study, but what Renton says is if you don't do your own study, the studies you rely on have to be reasonably related to what you are regulating and that makes sense. Later decisions, the Wall Distributors case that we cited, which by the way was a criminal statute not a civil statute, says the standard is, did the city act arbitrarily or capriciously in relying on these studies? Here is the key issue, the plaintiffs would have the Court believe, and this is in their reply brief, that the issue is whether the studies studied the exact same issue that was before the City Council of Rochester. That is not the test. Every time there is a new adult-type entertainment business open, the city does not have to go out and do a new study to evaluate that type of business as long as the studies they relied on are related to that business.

Now, the plaintiffs contend that the studies that the city relied on are not related to this type of business, primarily because -- as a matter of fact, it might be solely because this adult business is only carryout material. I guess the second argument is in addition we're not a completely adult book store, we have other stuff. Those are the two different arguments as I see it.

Your Honor, this study -- and I haven't seen the affidavit being referred to this morning. But the study, the St. Paul study, the Indianapolis study, the Phoenix study, virtually every one of

them has a definition of adult book store that is identical to the Rochester case. Your Honor, that makes sense. I mean, let's put ourselves back in 1988 when the city council of Rochester is doing this study. They go out and look at studies from other cities that concluded that there are potential adverse secondary effects by these businesses. What is Rochester going to do? They're not going to reinvent the wheel and come up with brand new definitions. They're going to define these adult entertainment uses the same way the other cities did. That's exactly what Rochester did.

The definition of an adult book store in the St. Paul Zoning Ordinance talks about a shop which offers slides, records, audio tapes, videotapes, all printed matter, if such shop is not open to the public generally or if a substantial or significant portion of such items are characterized by adult material. That's the exact definition we're talking about?

THE COURT: I am not sure it is the exact definition. The Indianapolis study, at least according to my notes, examined the secondary effects of adult entertainment businesses defining that term as businesses which primarily feature sexually stimulating material and/or performances. The first St. Paul study didn't state a pertinent definition, but it did state that it was examining "bars, X-rated theaters, book stores specializing in pornography, massage parlors or other adult entertainment businesses." The second St. Paul study said that it was retaining the sex-related focus of the definition in place as of 1987. It seems to me the focus of those studies is a little different than what we're dealing with in terms of this plaintiff and this case.

MR. THOMSON: It can only be different I submit, Your Honor, in two regards. They could be different on the issue of primary versus -- in other words, the two issues are did the

Indianapolis and St. Paul studies deal with businesses that were solely devoted to adult uses, whether.they are take out or not take out? I agree. I mean, we cited that definition from the Indianapolis one in our brief, which is on page one. It talks about a business which primarily features sexually stimulating materials or performances. Maybe at trial in this case we will be examining exactly what that study did, the remaining evidence on that. But to me a book store is one that segregates materials that are sexually stimulating. It doesn't have performances, but it has material.

The St. Paul definition, which is on page 43 of the 1987 St. Paul study, that definition is identical. In the comments on the St. Paul study which I cited in my letter, it was clear to me that bookstores were a concern. Now, apparently there is some factual dispute as to whether a book store is just a takeout book store. The definition in the St. Paul code clearly says it's just takeout. There's nothing in the definition of adult book store that talks about on premise consumption. There are other definitions -- adult motion picture theater, adult mini-motion picture theater -- that do contain those definitions.

THE COURT: I guess what I am concerned about, it seems to me the thrust of the other studies is that establishments in which there is something going on at the establishment, it's more than just a takeout location. We can quibble about how much is going on and what they are doing there. Those studies reach certain conclusion in terms of the impact on individuals involved in it, but I think the question before me, at least one of the questions before me is can I draw the same inference with respect to this establishment in Rochester under the circumstances that are here as those studies drew in the other type of activity?

MR. THOMSON: I submit the inquiry is just slightly different than that. I submit the inquiry is did the city council act

arbitrarily or capriciously unreasonably at this stage of this case where we're talking about--

THE COURT: You may be right, but if I can't draw the inference, then it seems to me the next logical conclusion to that is to conclude that the city did act arbitrarily.

MR. THOMSON: Except that when you look at the studies and they contain statements, the one I quoted from St. Paul, in many cities adult book stores and movie theaters are associated with most serious land use problems. The next quote, "It was admitted by residents of the University-Dale neighborhood that problems associated with the adult theaters and book stores were a higher priority for them than health clubs or massage parlors." Health clubs and massage parlors are clearly on premise consumption.

THE COURT: I am assuming they're talking about the Faust Theater up here. Isn't that the one where they had the booths in the establishment and you put the coins in and it's an on-premise establishment, none of which is applicable to what is going on, as I understand it, with the particular plaintiff's operation in Rochester.

MR. THOMSON: Your Honor, the Faust Theater, I think, was one of them. If you give me just a minute I think they had a list -- here it is. On Appendix A of the St. Paul study, page 51, the Faust Theater is listed as an adult motion picture theater with an address of 626 University Avenue. It also lists the Flick Theater as an adult motion picture theater at 621 University Avenue. It also lists the Union book store at 674 University Avenue as an adult book store. It doesn't list it as an adult motion picture theater or an adult mini-theater or a cabaret or anything else. It's clear that at least for purposes of this one study there was one book store.

THE COURT: It was clear that there was some store with that name. I don't know what was in the store, what they were offering.

MR. THOMSON: In order for it to be a book store by definition in the St. Paul code, it had to be one that only allowed for off premises use because that's the definition of a book store in the --

THE COURT: That's the name of Joe's book store. Well, Joe's book store could be operating a movie theater. The name of the store doesn't control what's inside is what I am getting at.

MR. THOMSON: Standing here I can't represent to the Court what was involved. All I can tell you is the St. Paul study set out four classifications in its appendix. It had book store, motion picture theater, cabaret and it had health club. And it put this book store under its classification of book store, which leads me to believe that that's all they had, because that's how they define it.

The Phoenix study contained the same definition. Now, if what the Court is suggesting is that there isn't sufficient evidence at this time to show that these studies studied the exact same issue that is going on in Rochester, I think that's where we do come down to a question of what exactly is the law in this area. I don't think the law is that every time there is a different twist -- I mean, people that operate these types of business are entrepreneurs and they know what the law is and know how to try to make the most business they can. But if that was the law, every time a new business or new twist came into effect, a city would have to do a completely new study on that exact type of use and I don't think that's what the law requires. I don't think that's what the law says the Renton Court said.

THE COURT: I'm not sure that's what the law requires.

I think the question is can you, as you've argued --I guess that's the question, can you take those studies and basically argue? If you can, then you don't have to have a new study. If you can't, then you're going have to have a new study.

MR. THOMSON: I think that's the nub of this case, at least at this stage. Was Rochester required to go out and either conduct its own study on this particular unique type of use or go find a study from some other city that had studied this particular kind of use, a book store that has 40 percent of its floor area? I don't think that's what the law is as long as what the studies have relied on are reasonable. And I admit in Wolff what happened was you got a video store, but less than ten percent of its floor area was devoted to adult videos that were segregated out. Judge Magnuson concluded that none of the studies addressed that, but that's not what we're dealing with here. This is not a video store, it's a book store that probably does sell some videos.

THE COURT: Before we get right to the end, I'd like to have you address this question of a substantial and significant --

MR. THOMSON: On that, Your Honor, I think that, number one, the law is overwhelming that substantial or significant is not vague. There has only been one case cited, the Elwest case cited by plaintiffs, that supports their position -- that it's vague.

Now, in Elwest, what happened was the health officer after a trial on the merits, it was not at a preliminary injunction stage, after a trial on the merits had testified different ways as to how he was going to enforce the ordinance, how it would be enforced. It was an "as applied test" at trial. Here, Your Honor, what we have is, I submit under any definition in the ordinance, an adult book store. There is 40 percent of the floor area, 50 percent of the sales. Under any definition of substantial or significant, it meets that definition. I don't think the courts have required

municipalities to draw bright lines in the sand at the start of a case, which is where we're at here, -- the preliminary injunction stage, saying this is where you cross it, this is where you don't. There are guidelines that are out there. We have cases that say that ten percent is not substantial or significant, the Wolff case. And I would agree that a study that studies adult uses that have substantial or significant portions of the business may not be relevant to a business that doesn't have a substantial or significant portion of its business, but I don't think that's the issue we have here. I think the issue we have is a business that does meet that definition.

THE COURT: If you have this business saying how do we comply, assuming that's the question, they come down to city council or the city attorney's office and they say, okay, 40 percent is too much, what do we do, we're willing to cut back space or sales or something, who's going to give them an answer to that question?

MR. THOMSON: The city is, Your Honor. There is no question about that.

THE COURT: What are they going to tell them? What's the answer going to be?

MR. THOMSON: I think the answer might be different in every case.

THE COURT: I am only interested in Rochester.

MR. THOMSON: Your Honor, Mr. Tigue is right, standing here today. I can't tell you, because that issue hasn't come before the city yet. Again, I want to emphasize we're at a preliminary injunction stage here, not at a trial on the merits, which is what those other cases all were. It was after the Alexander case, the Elwest case were all tried on the merits in which the zoning administrator could not tell this particular plaintiff, even after the

case had gone through discovery and trial, how he could comply. And that's not what we have at this stage of the case.

THE COURT: I agree we're at a preliminary stage. I'm just not sure that having a year of discovery and a decision is going to aid anybody in answering that question.

MR. THOMSON: Maybe the Court is right on that. I don't think there is any question that this business applies. The notice of violation didn't say bring in the compliance, it says your business violates this ordinance.

THE COURT: Your position is that at least what they're doing now is substantial and significant?

MR. THOMSON: That's right. What they're doing now and whether or not they could change that is not the issue before the Court, at least for today.

I know the Court is running out of time and I will finish. I guess in conclusion what I will say is that the courts have said, and Hart Bookstores is the one that uses this language, it's not mine, is that celestial precision in this area is not necessary. It's almost impossible to do that. I think the issue is was the city acting reasonably. And at least for purposes of the preliminary injunction stage -- and I didn't even get into the other stuff in the injunction -- keep in mind that the plaintiffs had an opportunity to come to the city before opening, they knew the ordinance was in place, and say, "Look, we want to comply, what do we do?" They didn't do that. They opened up the business in violation of the ordinance and made the city react. And that's why we're here today, because they didn't come in ahead of time.

THE COURT: Thank you. Mr. Tigue, briefly. I say briefly because I have another matter coming on at 9:00.

MR. TIGUE: I realize that, Your Honor. Three things. One is as to the issue of the studies. Apparently Mr. Thomson

didn't get his fax from my office yesterday, so I will give a copy of Mr. Buchanan's affidavit. But the issue is, as the Court correctly decided it, do the studies reasonably relate to the use that's present there? And going back to Appendix A of the St. Paul study, Union Book Store, Mr. Buchanan's affidavit says I visited them all. They all have peep shows. They all have that on-premises entertainment and in the fact the Union Book Store is probably the only use that's on the list there that's still in existence in the city of St. Paul. I invite the Court to go down and see the peep shows. It's there.

THE COURT: I appreciate the invitation.

MR. TIGUE: I don't represent them, but every adult book store in the world has peep shows. It's a standard of the business. The studies must reasonably relate to the use.

Yes, the definitions in all of these studies match the Rochester ordinance, but the issue is do the studies study the uses that are present here in Rochester? The answer is no, they don't. And yes, the St. Paul definition is exactly the same, and that's one of the reasons Judge Magnunson just issued a temporary restraining order against the St. Paul ordinance, and we will go to that hearing tomorrow and argue the same thing before Judge Magnuson.

The other thing I note about Appendix A, if you read it over, you won't find a single video store on the list. You won't find a single video store that has an adults only section. And in Judge Magnuson's case we found 27 of them. They didn't study one of them in any of these studies. It's clear that the studies that related to the type of use here simply haven't been done and there is simply no basis for doing it, for concluding it.

I am glad to note that my prediction was accurate. Mr. Thomson couldn't tell you what constitutes substantial or significant, and the plaintiffs have asked the City of Rochester

twice, once before the Zoning Appeals and once before the city counsel, and they have gotten the same answer both times. So what Mr. Thomson wants these plaintiffs to do is guess at what it means and a wrong guess means 90 days in jail. He is telling you that he can't tell you what substantial or significant means, yet he wants these plaintiffs out here to guess at what it means and risk 90 days in jail if they guess wrong.

THE COURT: He has said that the city's position is clear that what your client is now doing in view of the city attorney's office --

MR. TIGUE: I guess that's my last point. I did cite in my reply the memorandum the Quens case out of the state of California in which that court took substantial or significant language and said you have to have a preponderance before you fall within a definition of the ordinance. So there is at least one court in the United States, and the Appeals Court in the State of California, that says they don't fall within the definition. And in fact, one of the definitions of unconstitutionally vague is is it reasonably susceptible of different constructions? And I cited you a couple of cases in that regard. Mr. Thomson can't tell you what it means, and the courts have disagreed as to what it means. And that's the best argument of all that it's unconstitutionally vague.

THE COURT: Thank you, counsel. I will take the matter under advisement and try to get out a decision in the not to distant future. I appreciate your coming up.

* * *

CERTIFICATE

I hereby certify that the forgoing is a true and correct transcript of proceedings held in the above-entitled matter.

/s/

Robert W. Riley
United States Court Reporter

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

ILQ Investments, Inc.,
and Excalibur Group, Inc.,
Plaintiffs,

vs. Civil No. 3-92-751
MEMORANDUM OPINION
City of Rochester AND ORDER
Defendant.

Randall D. B. Tigue, Minneapolis, Minnesota, for plaintiffs.
James J. Thompson, Holmes & Graven, Minneapolis, Minnesota, and Terry Adkins, Rochester City Attorney, for defendant.

Introduction

Plaintiffs brought this action against defendant alleging violations of their rights under the first, fourth, and fourteenth amendments of the United States Constitution and Article 1, Section 3 of the Constitution of the State of Minnesota.[1] They seek declaratory and injunctive relief pursuant to 42 U.S.C. § 1983. Jurisdiction is alleged under 28 U.S.C. §§ 1343(3), 2201, 2202 and 1367(a). Now before the Court is plaintiffs' Motion for a Preliminary Injunction.

[1] Plaintiffs have not contended that the Constitution of the State of Minnesota supports an injunction. Accordingly, there is no discussion herein of the plaintiffs' claims under the State constitution.

Background

A. The Parties

Plaintiff ILQ Investments, Inc. owns real property located at 220 SW 1st Avenue, Rochester, Minnesota.

Plaintiff Excalibur Group, Inc. operates a business entitled "Downtown Book and Video" located on the main floor of the building which occupies 220 SW 1st Avenue.[2]

Defendant City of Rochester ("Rochester") is a municipality organized under the constitution and laws of the State of Minnesota.

ILQ operates "Downtown Book and Video" as a book and video store.[3] About sixty percent (60%) of the floor space is devoted to the sale of books and magazines and the rental of videotapes of a general nature and is open to the public generally. About forty percent (40%) of the floor space is devoted to the sale of adult novelties and sexually explicit books and magazines as well as the rental of sexually explicit videotapes. The sexually explicit materials are physically segregated from the rest of the store and minors are not permitted into this area.[4]

B. The Ordinance

In April 1988, the Common Council of the City of

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[2] ILQ Investments, Inc. and Excaliber Group, Inc. will be known collectively as "ILQ."

[3] Prior to the bookstore opening, a business known as China Hall, which was a purveyor of china, crystal, pottery, glassware and tabletop supplies, occupied the main floor of the property.

[4] Plaintiffs physically segregate the sexually explicit materials and exclude minors from the area containing those materials in compliance with Minn. Stat. § 617.293. It is undisputed that the bookstore is in compliance with that statute.

Rochester ("Common Council") adopted Ordinance No. 2590 entitled "An Ordinance Relating to Zoning; Defining and Restricting Adult Entertainments; Providing for Distancing Requirements, Definitions, and Restrictions of such Establishments From Residential Districts and other uses; . . . " Ordinance No. 2590 was adopted in response to a year long investigation by the Rochester Planning Department into issues pertaining to the presence of adult entertainment uses in Rochester. In March 1988, various committees and commissions studied the report issued by the Planning Department and conducted public hearings regarding the issue of adult entertainment uses. On April 13, 1988, the Planning Commission proposed certain amendments to Rochester's Zoning Code. On April 18, 1988, the Common Council adopted those amendments, which are contained in Ordinance 2590.

Several terms and provisions in Ordinance No. 2590 are relevant to the motion decided herein. First, the Ordinance defines "adult bookstore" as follows:

> A business engaging in the barter, rental, or sale of items consisting of printed matter, pictures, slides, records, audiotapes, videotapes or motion picture, film, if such shop is not open to the public generally but only to one or more classes of the public, excluding any minor by reason of age, or if a substantial or significant portion of such items are distinguished or characterized by an emphasis on the depiction or description of "specified sexual activities" or "specified anatomical areas."

§ 60.4012 (emphasis added). Section 60.4012 thus provides two separate definitions of "adult bookstore." The first definition is based solely upon whether a business excludes minors or other members of the public from the premises. The second definition is based solely upon the extent to which the business

makes available certain products of a sexually explicit nature.

The Ordinance defines the term "adult establishment" as follows:

> A business engaged in any of the following activities or which utilizes any of the following business procedures or practices; either:
>
> a. any business which is conducted exclusively for the patronage of adults and as to which minors are specifically excluded from patronage thereat either by law or by the operators of such business, except any business licensed under Chapter 125A of the Rochester Code of Ordinances; or,
>
> b. any other business which offers its patrons services or entertainment characterized by an emphasis on matters depicting, exposing, describing, discussing or relating to specified sexual activities or specified anatomical areas. Specifically included in the term, but without limitation, are adult bookstores, ...

Id. § 60.4015. Finally, the Ordinance restricts the location of adult establishments:

> LOCATION. All adult establishment uses shall be located not less than 750 feet from any residential district boundary, from any church, from any school, or from any youth facility.

Id. § 65.270.

It is undisputed that ILQ's bookstore is located within 750 feet of the Rochester Public Library, which is defined as a "youth facility" in sectiOn 60.4795 of the Ordinance. It is also undisputed that the sexually explicit materials available in the bookstore regard "specified sexual activities" and "specified anatomical areas" as those terms are defined in sections 60.4642 and 60.4643 of the

Ordinance.

C. The Controversy

On August 7, 1992, the Zoning Administrator for Rochester sent ILQ a Notice of Violation of the Rochester Zoning Ordinance ("Violation I"). This notice informed ILQ that the use that had been established on the property violated the site location restrictions in Ordinance No. 2590. Specifically, the Zoning Administrator determined that the bookstore located on the property was an "adult establishment" as that term is defined in section 60.4015 of the Rochester City Ordinances. The Zoning Administrator based this determination on the definition of "adult establishment" set forth at section 60.4015(b) as well both definitions of "adult bookstore" in section 60.4012. The Zoning Administrator further determined that as the book store was an adult establishment located within 750 feet of the Rochester Public Library, the location violated the provisions of paragraph 63.252, subd. 9 of the Rochester Code of Ordinances.[5]

Also on August 7, 1992, the Zoning Administrator sent ILQ a second Notice of Violation ("Violation II"). This notice informed ILQ that it had changed the use of the property on which the bookstore is located without first obtaining a zoning certificate from Rochester, thereby violating section 61.111 of the Rochester Zoning Ordinance. specifically, the Zoning Administrator determined that the change from sales of china dishes, etc., to sales of inter alia, sexually explicit books and videos, changed the retail product mix and thus was a new use of the property, requiring a zoning certificate.

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[5] ¶ 63.252, subd. 9 of the Rochester Code of Ordinances is identical to § 65.720 of Ordinance No. 2590.

ILQ appealed both decisions of the Zoning Administrator to the Zoning Board of Appeals ("Zoning Board"). On September 2, 1992, the Zoning Board conducted a public hearing to hear the appeals of ILQ concerning both Violations I and II. Subsequently, the Zoning Board issued Findings of Fact and Conclusions of Law affirming in its entirety the Zoning Administrator's decision regarding Violation II, and affirming with modifications, the Zoning Administrator's decision regarding Violation I.

The Zoning Board determined that by a preponderance of the evidence presented

> ILQ operated the business . . . as an adult bookstore on the basis that a substantial or significant portion of the bookstore's items are distinguished or characterized by an emphasis on the depiction or description of "specified sexual activities" or "specified anatomical areas," as the latter terms are defined by the Rochester Zoning Ordinances.

(Def's Exh. 12, Conclusions of Law ¶ 5.) The Zoning Board further determined that by a preponderance of the evidence presented

> ILQ operated the business . . . as a business which offered its patrons services or entertainment characterized by an emphasis on matter depicting, exposing, describing, discussing, or relating to "specified sexual activities", or "specified anatomical areas," as the latter terms are defined by the Rochester Zoning Ordinance.

Id. ¶ 6.

The Zoning Board thus concluded that the Zoning Administrator had properly determined that the bookstore was an "adult bookstore" under the second definition in section 60.4012, but that the Zoning Administrator had erred in determining that the

bookstore was an "adult bookstore" under the first definition in that section. The Zoning Board further concluded that the Zoning Administrator had properly determined that the bookstore was an adult establishment under section 60.4015(b).

ILQ appealed the Zoning Board's decision to the Common Council. On October 19, 1992, the Common Council conducted a public hearing on the appeal. On November 6, 1992, the Common Council issued Findings of Fact and Conclusions of Law as to both Violations I and II. The Common Council affirmed in its entirety the Zoning Administrator's decision to issue both Violations I and II. The Common Council modified, however, the Zoning Board's basis for affirming the Zoning Administrator's issuance of Violation I, reinstating the Zoning Administrator's original determination that the bookstore was an "adult bookstore" under both definitions in section 60.4012. (Def's Exh. 14, Conclusions of Law ¶¶ 6-7, Order ¶¶ 1-3.)

This action followed.

Discussion

The test for a preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure requires consideration of four factors:

1. the threat of irreparable harm to the movant;
2. the state of the balance between this harm and the injury that granting the injunction will inflict on the other parties litigant;
3. the probability that the movant will succeed on the merits; and
4. the public interest.

Dataphase Systems v. C.L. Systems. Inc., 640 F.2d 109, 113 (8th Cir. 1981) (en banc). None of these factors alone is dispositive and a court must balance all four factors to determine "whether the

balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are decided." Hill v. Xyquad, 939 F.2d 627, 630 (8th Cir. 1991) (quoting id.)

A. Irreparable Injury

The threshold inquiry is whether the moving party has shown a threat of irreparable injury. ILQ argues that it faces irreparable harm because the existence of the ordinance forces it choose between exercising its First Amendment rights and facing criminal prosecution. ILQ contends that loss of first amendment freedoms constitutes irreparable harm as a matter of law. Elrod v. Burns, 427 U.S. 347, 373, 96 S. Ct. 2672, 2699, 49 L.Ed.2d 547 (1976). ILQ further contends that irreparable injury is established when an individual is forced to choose between foregoing first amendment freedoms and facing criminal penalties. Doran v. Salem Inn, Inc., 422 U.S. 922, 931, 95 S. Ct. 2561, 2568, 45 L.Ed.2d 648 (1975).

Rochester responds that facing a loss of first amendment freedoms alone does not create a threat of irreparable injury. See Rushia v. Town of Ashburnham, 701 F.2d 7, 10 (1st Cir. 1983). Rochester argues that there is no threat of criminal prosecution here and thus ILQ faces no imminent irreparable injury.

It is well established that loss of first amendment freedoms, for even minimal periods of time, constitutes irreparable injury, Elrod, 427 U.S. at 373, 96 S. Ct. at 2690, but loss of those freedoms alone may not be sufficient to warrant a preliminary injunction. Doran, 422 U.S. at 931-32, 95 S. Ct. at 2568; Rushia, 701 F.2d at 10. However, when the threat of such loss is combined with the real possibility that choosing to exercise first amendment freedoms will result in criminal penalties, a movant establishes a threat of irreparable injury warranting injunctive

relief. See Hohe v. Casey, 868 F.2d 69, 73 (3d Cir.), cert. denied, 493 U.S 848, 110 S. Ct. 144, 107 L.Ed.2d 102 (1989). Threatened criminal prosecution authorized by the ordinance is sufficient to constitute "irreparable injury" because it potentially will have a "chilling effect on free expression."[6] Dombrowski v. Pfister, 380 U.S. 479, 487, 85 S. Ct. 1116, 1121, 14 L.Ed.2d 22 (1965). On the record before the Court at this time, the irreparable injury factor favors granting an injunction.

B. Balance of Harms

Both ILQ and Rochester have important interests. On ILQ's side are first amendment freedoms. On Rochester's side are the interests in (1) attempting to preserve the quality of urban life by controlling land use and development, and (2) shielding minors from sexually explicit materials which are not considered obscene. Rochester argues that an injunction will significantly impair or limit its legislatively-created police powers.

Many of the harms which may befall Rochester if an injunction is granted are significant; however, none of them is as imminent as ILQ's loss of first amendment rights or risk of criminal prosecution. In addition, although Rochester contends that its decision not to enforce the ordinance reduces the risk of imminent harm to ILQ, its willingness to not enforce the ordinance also decreases the imminency of any potential harm to it if the

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[6] Rochester contends that there is no imminent threat of criminal prosecution because ILQ's store has remained open during pendency of the administrative process and this action. The record indicates, however, that Rochester's decision not to enforce the ordinance was the result of its decision to await the hearing on the preliminary injunction. In fact, the letter agreement between Rochester and ILQ is limited to a time period "until the hearing" on ILQ's motion for a preliminary injunction. The Court cannot conclude that Rochester will not enforce the Ordinance if ILQ's motion is denied.

injunction is granted. The balance of harms factors thus supports granting ILQ's motion for an injunction.

C. Likelihood of Success on the Merits[7]

ILQ contends that there is a likelihood that it will succeed on its claims that Ordinance No. 2590 is unconstitutional under both the first and fourteenth amendments to the United States Constitution. Specifically, ILQ alleges that (1) the Ordinance's definition of "adult bookstore" is unconstitutionally vague and thus violates ILQ's due process rights under the fourteenth amendment, and (2) the Ordinance impermissibly violates ILQ's rights to free expression under the first and fourteenth amendments.

1. Vagueness Objection

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298, 33 L.Ed.2d 222 (1972). In the first amendment context, vague enactments operate to chill the exercise of freedoms of expression because uncertainty as to the meaning of an enactment may cause citizens to take a wider berth around the prohibitions in the enactment than they would if the enactment were precisely delimited. Id. at 109, 92 S. Ct. at 2299 (citations omitted). Accordingly, a "stricter standard" of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech. Hynes v. Mayor and Council of Borough of Oradell, 425 U.S. 610, 620, 96 S. Ct. 1755, 1760, 48

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[7] In determining whether this factor militates in favor of granting or denying a preliminary injunction, the court must take care to avoid "wooden" application of probability rules. Instead, the court should retain a focus on whether the balance of equities favors the movant to a sufficient degree. Calvin Klein Cosmetics Cord. v. Lenox Labs., 815 F.2d 500, 503 (8th Cir. 1987).

L.Ed.2d 243 (1976).

ILQ contends that Ordinance No. 2590 is impermissibly vague as it regards the second definition of "adult bookstore" in section 60.4012. Specifically, ILQ argues that the phrase "substantial or significant portion" which appears in that clause, fails to provide businesses:with standards sufficient to determine whether a business is an "adult bookstore." ILQ further argues that the lack of standards makes it impossible for it to comply with the Ordinance.[8]

Rochester responds that ILQ may not question the vagueness of "substantial and significant portion" because it is clear that under any construction of that phrase, a substantial and significant portion of ILQ's business is in fact characterized by an emphasis on sexually explicit material.[9] Rochester argues that under principles of standing, a party may not allege that an enactment is unduly vague when that enactment clearly applies to it. City of Renton v. Playtime Theatres Inc., 474 U.S. 41, 55 n.4, 106 S. Ct. 926, 933 n.4, 898 L.Ed.2d 29 (1986); Young v. American Mini-Theatres. Inc., 427 U.S. 50, 58-59, 96 S. Ct. 2440, 2446-47, 49 L.Ed.2d 310 (1976).

Initially, the Court finds that the statements in Renton and Young regarding standing principles are not applicable here. In both Renton and Young, the theaters' own allegations indicated that they fell within the scope of the allegedly vague language. Renton, 475 U.S. at 55 n.4, 106 S. Ct. at 933 n.4; Young, 427 U.S.

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[8] Under the Ordinance, an "adult bookstore" is an "adult establishment" and therefore is subject to the 750' location restriction. See Ordinance No. 2590, §§ 60.4015, 65.720.

[9] ILQ denies this assertion. (Reply Mem. Supp. Mot. Prelim. Inj., at 10.)

at 60 n.17, 96 S. Ct. at 2447 n.17. In contrast, ILQ does not concede that its devotes a significant or substantial portion of its business to sexually explicit material. (Reply Mein. Supp. Mot. Prelim. Inj., at 10.) ILQ, therefore, does have standing to raise a vagueness claim.

Upon a review of the ordinance and Rochester's construction thereof, the Court concludes that ILQ has shown a likelihood of success on its claim that the phrase "substantial and significant portion" is unconstitutionally vague. By failing to define what it meant by "substantial and significant portion" the Common Council has precluded ILQ from determining how much sexually explicit stock can be retained without being defined as an adult bookstore. Such a classification system both prevents persons from determining how to comply with the Ordinance (e.g., how to avoid being deemed an adult bookstore under the second definition) and encourages arbitrary and discriminatory enforcement of the Ordinance.[10] Alexander v. City of Minneapolis, 713 F. Supp. 1296, 1303 (D. Minn. 1989), rev'd on other grounds, 928 F.2d 278 (8th Cir. 1991); see Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858, 75 L.Ed.2d 903 (1983).

Moreover, the record indicates that Rochester officials were, and are, unable to determine the meaning of "substantial and significant" and how that definition applies to stores like ILQ. At the March 23, 1988, hearing before the Planning and Zoning Commission, Planning Commissioner Bob DeWitz asked the

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[10] Because the statute may be vague as applied to ILQ, this case does not necessitate consideration of the principle that in some circumstances, a facial challenge to an ordinance may be raised by a party who cannot allege that the statute is vague as applied to him. Young, 427 U.S. at 60-61, 96 S. Ct. at 2447-48 & n.17.

Planning Department's Ronald Livingston "what effect would the [location restriction) have on video stores." (Def's Exh. 5, at 6.). Livingston replied that the restriction "would have an effect on stores at which minors are not permitted." Id. Livingston did not even raise the second definition in section 60.4012.

Similarly, at the April 13, 1988, public hearing before the Common Council, a Rochester resident asked if an adult establishment "included the back room of a video store." (Def's Exh. 7, at 9.) Douglas Gregor replied that for a video store to be included "there has to be an 'emphasis' on the adult material." Id. Gregor did not, however, elaborate on the meaning of "emphasis." Gregor further stated that "it is difficult to create standards." Id. Finally, at the February 18, 1993, hearing on ILQ's Motion for Preliminary Injunction, Rochester conceded that although its position was that ILQ's bookstore offered a substantial and significant portion of sexually explicit materials, it could not provide the Court with a reasonably certain definition of "substantial and significant portion."

It is true that vagueness principles do not require mathematical precision. However, if Rochester officials cannot determine how to apply the "substantial and significant portion" standard, there is no reason to expect that ILQ or any other business owner could make those determinations.

2. First Amendment Objections

Even if the foregoing definition of "adult bookstore" is impermissibly vague, however, Rochester's application of Ordinance No. 2590 to ILQ could be upheld if defining ILQ as an "adult establishment" under section 60.4015(b) passes constitutional muster. (See Def's Exh. 14, Conclusions of Law, at ¶ 7.) (quoting Ordinance 2590, § 60.4015(b)). ILQ has not alleged that this

definition is unconstitutionally vague.[11] ILQ argues, however, that applying the Ordinance to its bookstore violates its rights under the first amendment to the United States Constitution.

The crux of ILQ's first amendment objection is that Ordinance No. 2590 is unconstitutional (a) on its face and, (b) as applied to it because under § 60.4015(b) of the Ordinance, a store that sells or rents any sexually explicit material is an "adult establishment" and subject to the 750 foot location restriction; this classification makes Ordinance No. 2590 unconstitutionally overbroad and a restriction on protected expression which does not serve a substantial governmental interest.

Rochester responds that it has construed the definition of "adult establishment" in § 60.4015(b) to apply only to businesses which are characterized by an emphasis on sexually explicit material. Rochester contends that under this construction, Ordinance No. 2590 does not apply to businesses that sell only a small portion of sexually explicit material; rather, the Ordinance applies only to businesses that emphasize sexually explicit material. Rochester further contends that ILQ's bookstore does emphasize sexually explicit material and thus it is properly covered by the Ordinance.

There is nothing in the record, however, which indicates that Rochester has applied such a limiting construction to §

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[11] At the hearing on ILQ's motion, Rochester stated that in affirming Violation I, the Common Council concluded that the first definition of "adult bookstore" in § 60.4012 applied to ILQ because it excludes minors from 40% of its bookstore. ILQ has not alleged that the first definition in § 60.4012 is unconstitutionally vague. Accordingly, this definition also subjects Ordinance No. 2590 to a first amendment challenge. The parties, however, have not focused their arguments on this issue.

60.4015(b). Accordingly, for purposes of this motion, the Court will consider the definition as set forth in the Ordinance and assume that under § 60.4015(b), an adult establishment includes a business that provides any entertainment which is "characterized by an emphasis on matter depicting, exposing, describing, discussing or relating to" sexually explicit expression. Under this definition, Ordinance No. 2590 clearly applies to ILQ's bookstore.[12]

There is no dispute that in operating the bookstore, ILQ is engaging in "expression" protected by the first and fourteenth amendments to the United States Constitution. See Bantam Books v. Sullivan, 372 U.S. 58, 83 S. Ct. 631, 9 L.Ed.2d (1963). The threshold question in any first amendment case involving zoning ordinances is whether the restriction is content-based or content neutral. Schneider v. City of Ramsey, Civ. No. 4-90-320 (D. Minn. May 11, 1990). Regulations or ordinances are content-based if they are enacted for the purpose of restraining speech or expression; if so, they are presumptively invalid. City of Renton

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[12] The Court notes that there are two difficulties with Rochester's alleged construction. First, the offered construction clashes with other portions of the Ordinance. The second definition of "adult bookstore" in § 60.4012 contains the phrase "if a substantial or significant portion of such items are characterized by an emphasis on the depiction or description of" sexually explicit material. If, as Rochester contends, "characterized by an emphasis on" concerns the extent to which the business purveyed sexually explicit material, and not the material itself, "substantial and significant portion of such items" would be superfluous. As both parties have argued, that phrase is not superfluous.

Second, if § 60.4015(b) had been construed to apply only to businesses characterized by an emphasis on sexually explicit material, or more accurately, businesses that emphasize sexually explicit materials, that definition would not be any less vague than the definition of adult bookstore contained in the second clause of § 60.4012. The Supreme Court in Young, specifically declined to pass on whether "characterized by an emphasis" was unconstitutionally vague. 427 U.S. at 58, 96 S. Ct. at 2446.

v. Playtime Theatres Inc., 475 U.S. 41, 46-47, 106 S. Ct. 925, 929, 89 L.Ed.2d 29 (1986). Regulations or ordinances are content-neutral if justified without reference to the content of the regulated expression; as such, they are presumptively valid. Id., 106 S. Ct. at 929 (quoting Virginia Pharm. Bd. v. Virainia Citizens Consumer Council, 425 U.S. 748, 771, 96 S. Ct. 1817, 1830, 48 L.Ed.2d 346 (1976)).

The Supreme Court in Renton, determined that an ordinance which does not ban adult establishments altogether, but rather restricts the location of such establishments, is properly characterized as a "time, place, and manner" restriction. 475 U.S. at 46, 106 S. Ct. at 928. Time, place and manner restrictions are viewed as "content-neutral" and are constitutional so long as they are designed to serve a "substantial governmental interest and do not unreasonably limit alternative avenues of communication." Id. at 47, 106 S. Ct. at 928.

In passing on the constitutionality of a zoning restriction on adult entertainment, the municipality's purpose in enacting an ordinance is the dispositive consideration.[13] The Renton Court held that an ordinance restricting the location of movie theatres showing adult-only films was within the limits of the First Amendment because the city's predominant concern was with the "secondary effects" of adult theatres and not with the content of the films themselves. Id. at 47, 106 S. Ct. at 929. The Court in Renton reasoned that where secondary effects are the chief

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[13] In determining whether the Common Council of Rochester acted with a permissible purpose, the appropriate focus is not "an empirical inquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional." Barnes v. Glenn Theatre, Inc., ___U.S.___, 111 S. Ct. 2456, 2469, 115 L.Ed.2d 504 (Souter, J., concurring) (1991).

consideration for enacting an ordinance, a city need not conduct its own studies or generate its own evidence of adverse secondary effects; rather, it may rely on the studies and experiences of other cities, "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem the city addresses." Renton, 475 U.S. at 51-52, 106 S. Ct. at 931. In addition, the ordinance enacted was permissible in that it was "'narrowly tailored' to affect only that category of [establishments) shown to produce the unwanted secondary effects." Id. at 52, 106 S. Ct. at 931.

Renton and its progeny thus require a city's decision to regulate sexually explicit expression through zoning to be grounded in fact. This requirement is imposed in two ways. First, where as here, a city does not conduct its own studies prior to enacting an ordinance, the studies or other factual evidence creating the factual basis for the ordinance and hence the substantial governmental interest, must be "reasonably believed to be relevant to the problem that the city addresses." Renton, 106 S. Ct. at 931. Second, even if the governmental interest is substantial, the regulation must be "narrowly tailored to affect only that category of [business] shown by the factual evidence to produce the unwanted secondary effects." Id.; see Wolff v. City of Monticello, Civ. No. 4-92-279 (D. Minn. Oct. 20, 1992), slip op. at 8.

At its essence, ILQ's first amendment argument against Ordinance No. 2590 is that Rochester lacked the secondary effects evidence necessary for the Ordinance to serve a substantial governmental interest.[14] ILQ contends that although Renton

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[14] Although it does not express this contention, ILQ could also be said to argue that because the Ordinance applies to its bookstore and similar businesses, it is not narrowly tailored to affect only the category of business shown in the studies to produce unwanted secondary effects. Because the Court concludes that

allows cities to rely on the studies and experiences of other cities in enacting zoning ordinances pertaining to adult establishments, the secondary effects studies on which Rochester relied were so dissimilar to the business at issue that they could not reasonably be believed to be relevant.

Rochester responds that under Renton, it was proper to rely on other cities' studies and experiences. Rochester contends that the studies it relied upon in enacting Ordinance No. 2590 were reasonably believed to be relevant to businesses similar to ILQ's bookstore.

It is undisputed that Rochester did not conduct an independent study of the effects of adult establishments of any type, much less a study of secondary effects produced by book and video stores that offer both sexually explicit and non-sexually explicit materials and allow only off-premises consumption of those materials. Accordingly, Ordinance No. 2590 serves a substantial governmental interest only if the Common Council had a reasonable basis for believing that the studies actually relied upon were relevant to uses such as the bookstore operated by ILQ.[15]

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the substantial governmental interest factor is dispositive, it need not and does not decide whether it is likely that ILQ would succeed on its claim that Ordinance No. 2590 is not narrowly tailored to meet the state interest.

[15] Rochester contends that the applicable standard for judging a city's enactment of a zoning restriction is whether the city acted "arbitrarily and capriciously." Wall Distrib., Inc. v. City of Newport News, 782 F.2d 1165, 1169 (4th Cir. 1986). The Fourth Circuit's decision in Wall, however, predated Renton and was decided under the four-part test first established in United States v. O'Brien, 391 U.S. 367, 377, 88 S. Ct. 1673, 1697, 20 L.Ed.2d 672 (1968). In Renton, the Supreme Court established a new test for reviewing zoning restrictions on protected expression. In doing so, the Court looked only to the holding in Young, and not to the means by which the plurality and Justice Powell reached their decision in Young. Cf. 427 U.S. at 79-82, 96 S. Ct. at 2457-58

The evidence submitted by Rochester indicates that in enacting the ordinance, the Common Council relied on five studies; (1) a 1983 study by the Indianapolis, Indiana Division of Planning ("Indianapolis Study"); (2) a 1978 study by the City of St. Paul, Minnesota ("St. Paul I Study"); (3) a 1987 Supplement to the St. Paul I study ("St. Paul II Study");(4) a 1979 study by the City of Phoenix, Arizona ("Phoenix Study"); and (5) a report by the American Society of Planning Officials ("ASPO Report").[16] (Def's Exh. 2, at 5-8.)

A review of the factual bases, definitions, and operational methodologies of those studies supports a conclusion that ILQ has shown a substantial likelihood of succeeding on its claims that the evidence Rochester relied upon in enacting Ordinance No. 2590 was not reasonably related to the type of adult entertainment at issue here. Of the studies that define what is meant by "adult entertainment" or "adult business," none of the definitions supports a conclusion that the studies considered the secondary effects produced by businesses that sell sexually explicit material as a

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(Powell, J., concurring) (applying O'Brien test). Nevertheless, the court in Wall paralleled the Renton Court's subsequent conclusion that in enacting a zoning restriction on adult entertainment, a city must have a "reasonable basis" for determining that the enactment would alleviate undesirable secondary effects. 782 F.2d at 1169. Accordingly, Renton and O'Brien are parallel in that where relevant secondary effects evidence is lacking, a zoning regulation fails to serve a substantial governmental interest and the city's enactment of that restriction may be said to be arbitrary and capricious.

[16] The ASPO Report contained discussions of ordinances in Detroit, Michigan, Boston, Massachusetts, Norwalk, California, New Orleans, Louisiana, Fairfax County, Virginia and Santa Maria, California. The Report did not independently examine secondary effects produced by adult entertainment.

portion of a retail mix that involves non-sexually explicit materials.[17]

For example, the Indianapolis Study examined the secondary effects of "adult entertainment businesses" defining that term as businesses 'which primarily feature sexually stimulating material and or performances." The St. Paul I Study did not state a pertinent definition, but it did state that it was examining "[b]ars, X-rated theatres, bookstores specializing in pornography, massage parlors and other adult entertainment businesses." The St. Paul II Study stated that it was retaining the "sex-related focus" of the definition in place as of 1987.[18] None of these studies provides a basis for determining that the Common Council could reasonably have believed that the conclusions reached therein were relevant to the problems which may or may not be caused by businesses of a type similar to ILQ's bookstore.[19]

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[17] The Phoenix Study, which examined the effects of "adult businesses," does not define what that term means or how it affected the determination of the control and study areas.

[18] At oral argument, Rochester contended that the St. Paul II Study defined "adult use" and "adult bookstore" in an identical manner to Rochester's definition of "adult bookstore" and "adult establishment." The pages cited by Rochester, however, indicate that the cited definitions were merely proposed amendments to the definitions. Moreover, those definitions do not indicate what type of businesses were the focus of the St. Paul II Study.

[19] Rochester contends that under Renton, a city is not required to conduct or locate a study examining a specific type of adult entertainment, nor is a city required to conduct a study every time it is faced with a new type of adult entertainment. Whatever Renton says about a city's ability to rely on existing studies and experiences, Renton clearly establishes that a city may not choose to rely on external indicators of secondary effects without regard to relevance. In some circumstances then, the creation of a new form of adult entertainment likely will necessitate independent study. In any event, Rochester has not shown that the studies it actually relied upon meet the Renton standard of relevance.

Moreover, although each of the studies concluded that there were secondary effects produced by "adult" businesses, none of those studies discussed, much less concluded, that any business selling any amount of sexually explicit material produced secondary effects similar to those produced by businesses engaging exclusively or primarily in selling or making available sexually explicit material.[20] Neither do those studies support a reasonable inference that because a bookstore purveying only sexually explicit material and allowing on-premises consumption produces unwanted secondary effects, a bookstore featuring both sexually explicit and non-sexually explicit materials and requiring off-premises consumption produces the same effects.[21] See World Wide Video

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[20] Rochester makes much of the fact that it conducted its own study of secondary effects and that the study included the secondary effects produced by businesses of the type involved in this action. Rochester, however, did not conduct a "study" of the secondary effects of sexually explicit material. It prepared a "report" that reviewed other cities' studies of secondary effects and discussed a professional association's report on regulating sex businesses. Because Rochester specifically relied on studies and reports prepared by other entities, the factual bases for its enactment of Ordinance No. 2590 depend exclusively on those studies.

[21] The Washington Supreme Court's decision in Tukwila dealt with an adult entertainment establishment that "[i]n addition to selling and renting sexually explicit magazines, novelties, and videotapes, [had) eight panoram, or peep show, booths on the premises." 816 P.2d at 19. In a decision decided under the United States Constitution, not the Constitution of the State of Washington, the Supreme Court of Washington determined that the city had not shown that its adult entertainment use ordinance served a substantial governmental interest because the studies relied upon by the city did not show that adult businesses with predominantly "take home" merchandise have the same harmful secondary effects traditionally associated with adult movie theaters and peep shows. Id.

Tukwila is pertinent to this case because the establishment in that case, like ILQ, sold merchandise only on a take out basis, but unlike ILQ, the

vs. City of Tukwila, 816 P.2d 18, 21 (Wash. 1991), cert. denied, __ U. S. __, 112 S. Ct. 1672, 118 L.Ed.2d 39 (1992); cf. Thames Enterp., Inc. v. City of St. Louis, 851 F.2d 199 (8th Cir. 1988) (council member's testimony about secondary effects held sufficient to meet Renton test), reh'g denied.

In summary, although the Court recognizes that this motion is brought at a preliminary stage of the litigation, the evidence now before the Court justifies a conclusion that ILQ has shown a likelihood of success on the merits of its claim that Ordinance No. 2590 does not serve a substantial governmental interest and that it thus is an impermissible time, place, and manner restriction. In its current form, Ordinance No. 2590 includes within its restrictions businesses that sell, rent or otherwise provide any amount of sexually explicit material. Whatever the moral beliefs about businesses who supply such material, ILQ has shown a likelihood that Ordinance No. 2590 does not have an adequate factual basis to reach that far.

At a later stage of the litigation, Rochester may produce evidence sufficient to rebut ILQ's claim and the current record. Currently, however, the equities favor maintaining the status quo until the merits of this case are decided.

D. Public Interest

Cases such as this present strong conflicting public interests: Rochester's interest in protecting the public welfare of its citizens through zoning powers and ILQ's interest in exercising its

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establishment sold only sexually explicit merchandise. Thus, the Supreme Court of Washington's conclusion that a substantial government interest was not shown in that case supports this Court's conclusion that ILQ has shown a likelihood of success on its claim that Ordinance No. 2590 does not serve a substantial government interest.

first amendment rights. Upholding constitutionally guaranteed rights is in the public interest.

Playboy Enterp., Inc. v. Meese, 639 F. Supp. 581, 587 (D. D.C. 1986). Accordingly, the public interest factor supports issuance of a preliminary injunction.

ORDER

Based upon the records, files, and proceedings herein, and the briefs and arguments of counsel, IT IS ORDERED that:

1. Plaintiffs ILQ Investments, Inc. and Excalibur Group, Inc.'s Motion for a Preliminary Injunction (Doc. No. 2) is GRANTED. Until further order of this Court, defendant City of Rochester is hereby enjoined from taking any action, civil or criminal, to enforce the provisions of Ordinance No. 2950 against plaintiffs, their agents, officers, employees or persons acting under their direction and control; and

2. This order shall be effective upon plaintiffs filing a bond in the amount of $1,000.00.

Dated: February 22, 1993

/s/
RICHARD H. KYLE
United States District Judge

The foregoing Memorandum Opinion and Order constitutes the Court's findings of fact and conclusions of law in accordance with the requirements of Fed. R. Civ. P. 52(a).

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 93-1925

ILQ Investments, Inc., a Minnesota corporation; Excalibur Group, Inc., a Minnesota corporation,	*	
Plaintiffs - Appellees,	*	Appeal from the United States District Court for the District of Minnesota.
v.	*	
City of Rochester, a municipal corporation,	*	
Defendant - Appellant.	*	

Submitted: December 15, 1993
Filed: June 15, 1994

Before LOKEN, Circuit Judge, HEANEY, Senior Circuit Judge, and HANSEN, Circuit Judge.

LOKEN, Circuit Judge.

Rochester is a city of 75,000 people in southern Minnesota. In April 1988, Rochester enacted Ordinance No. 2590, a zoning

ordinance that defines and restricts the location of "adult establishment uses." In this case, the district court has preliminarily enjoined enforcement of Ordinance No. 2590 against a newly-opened adult bookstore in downtown Rochester. See ILQ Invs., Inc. v. City of Rochester, 816 F. Supp. 516 (D. Minn. 1993). Concluding that Ordinance No. 2590 will almost certainly survive constitutional challenge under City of Renton v. Playtime Theatres Inc., 475 U.S. 41 (1986), we reverse.

I.

In the summer of 1992, appellees ILQ Investments, Inc., and Excalibur Group, Inc. (collectively "ILQ"), opened Downtown Book and Video on the main floor of a commercial building in premises previously occupied by a retail china shop. Downtown Book and Video segregates forty per cent of its floor space into an adults-only area selling sexually explicit books, magazines, and novelty items that account for fifty per cent of the store's total sales. The store has no facilities for on-premises viewing of these sexually explicit materials.

On August 7, 1992, the Zoning Administrator issued two Notices of Violation. The first advised ILQ that it violated § 61.111 by changing the use of the property without a zoning certificate.[1] The second Notice frames the issues for this appeal. It informed ILQ that Downtown Book and Video was violating Ordinance No. 2590 because the store is an "adult bookstore"[2] and

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[1] Rochester requires a zoning certificate "before . . . an existing use is changed or modified so as to alter the character of its occupancy." Rochester Code of Ordinances § 61.111.

[2] An "adult bookstore" is a "business engaging in the . . . sale of items consisting of printed matter [etc.) . . . if a substantial or significant portion of such items are distinguished or characterized by an emphasis on the depiction or

an "adult establishment"[3] that is located within 750 feet of a "youth facility,"[4] the Rochester Public Library. Both Notices ordered the violations discontinued but gave ILQ ten days to appeal the Zoning Administrator' s decisions.

ILQ appealed to the Zoning Board of Appeals and then to the Rochester Common Council. Both held public hearings, made detailed findings of fact and conclusions of law, and upheld the Zoning Administrator's decisions. Foregoing judicial review in state court, ILQ commenced this 42 U.S.C. § 1983 action, seeking declaratory and injunctive relief on the ground that Ordinance No. 2590 violates ILQ's First Amendment and due process rights.

The district court granted a preliminary injunction, enjoining the City "from taking any action, civil or criminal, to enforce the provisions of Ordinance No. 2950 against [ILQ]." The court concluded that ILQ is likely to succeed on the merits of its

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description of 'specified sexual activities' or 'specified anatomical areas."' Rochester Code of Ordinances § 60.4012. The ordinances include detailed definitions of the terms "specified sexual activities" and "specified anatomical areas." See Rochester Code of Ordinances §§ 60.4642, 60.4643.

[3] An "adult establishment" includes an "adult bookstore" and is also generally defined as "any . . . business which offers its patrons services or entertainment characterized by an emphasis on matter depicting, exposing, describing, discussing or relating to specified sexual activities or specified anatomical areas." Rochester Code of Ordinances § 60.4015.

[4] A "youth facility" is a "public playground, public swimming pool, public library, or licensed day care facility." Rochester Code of Ordinances § 60.4795. "All adult establishment uses shall be located not less than 750 feet from any residential district boundary, from any church, from any school, or from any youth facility. In addition, no adult establishment use may be located within 750 feet of another adult establishment use." Rochester Code of Ordinances § 65.720.

constitutional challenge because the definition of "adult bookstore" is impermissibly vague, and because Rochester was unreasonable in relying on other cities' studies to justify both the breadth of Ordinance No. 2590 and its application to Downtown Book and Video. ILQ is irreparably harmed by this chilling of its First Amendment rights, the court reasoned, and the balance of harms and public interest support preliminary injunctive relief. See Dataphase Systems v. C.L. Systems, Inc., 640 F.2d 109 (8th Cir. 1981) (en banc).

Rochester appeals this preliminary injunction, challenging only one prong of the district court's preliminary injunction analysis -- whether ILQ is likely to succeed on the merits of its constitutional claims. We have jurisdiction to review the grant of a preliminary injunction. See 28 U.S.C. S 1292(a) (1). We review for a clearly erroneous factual determination, an error of law, or an abuse of discretion. See West Pub. Co. v. Mead Data Central, Inc., 799 F.2d 1219, 1222-23 (8th Cir. 1986), cert. denied, 479 U.S. 1070 (1987).

II.

ILQ does not allege that ordinance No. 2590 effectively bans adult entertainment uses from Rochester. Therefore, this zoning ordinance is "properly analyzed as a form of time, place, and manner regulation." City of Renton, 475 U.S. at 46. Time, place, and manner regulations are acceptable if they are "content-neutral," and if they are "designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." Id. at 47. Applying this test, we have recently upheld similar ordinances enacted by the cities of Little Rock, Arkansas, see Ambassador Books & Video Inc. v. City of Little Rock, No. 93-1509, 1994 WL 106467 (8th Cir. Apr. 1, 1994); Ramsey, Minnesota, see Holmberg v. City of Ramsey, 12

F.3d 140 (8th Cir. 1993); Minneapolis, Minnesota, see Alexander v. City of Minneapolis, 928 F.2d 278 (8th Cir. 1991); and St. Louis, Missouri, see Thames Ent., Inc. v. City of St. Louis, 851 F.2d 199 (8th Cir. 1988). See also SDJ, Inc. v. City of Houston, 837 F.2d 1268 (5th Cir. 1988), cert. denied, 489 U.S. 1052 (1989).

In applying the City of Renton test, the first task is to determine whether the ordinance is "content-neutral." This is a term of art. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). Thus, even if a time, place, and manner ordinance regulates only businesses selling sexually explicit materials, the ordinance is content-neutral if its purpose is to lessen undesirable secondary effects attributable to those businesses, such as increased crime, lower property values, or deteriorating residential neighborhoods. See Holmberg, 12 F.3d at 143; Doe v. City of Minneapolis, 898 F.2d 612, 617 (8th Cir. 1990).

ILQ argues that Ordinance No. 2590 is not content-neutral because Rochester has failed to prove that the City's adult businesses cause adverse secondary effects. That argument impermissibly confuses distinct aspects of the City of Renton test. Content neutrality focuses on the City's purposes in enacting the ordinance. Ward, 491 U.S. at 791. Here, it is clear that the Common Council targeted not the content of Downtown Book and Video's materials, but the anticipated impact of adult businesses on their surrounding communities. On this record, Ordinance No. 2590 is indisputably content-neutral.

To survive First Amendment scrutiny, a content-neutral regulation must be "designed to serve a substantial governmental interest." City of Renton, 475 U.S. at 47. Regulations reasonably

designed to curb unwanted secondary effects of sexually oriented businesses serve a substantial governmental interest. See id. at 50; Holmberg, 12 F.3d at 143. In identifying and measuring such secondary effects, a city may rely upon studies or evidence generated by other cities "so long as [that] evidence . . . Is reasonably believed to be relevant to the problem that the city addresses." City of Renton, 475 U.S. at 51-52; see also Ambassador Books & Video, 1994 WL 106467, at *4. The legislative history of Ordinance No. 2590 demonstrates that the City has satisfied this element of the City of Renton standard.

In February 1987, the Common Council became concerned about two adult bookstores located across from each other in downtown Rochester and directed the Planning Commission to study the effects of adult entertainment uses. On March 2, 1988, the Planning Department published the results of its study in a report entitled "Adult Entertainment: Land Use and Legal Perspectives." This report discussed the relevant legal issues and precedents and summarized studies of the adverse secondary effects of adult entertainment businesses conducted by other cities, including Minneapolis and St. Paul. The study concluded:

a) A considerable number of communities throughout the nation have studied the impacts which adult entertainments have on the areas surrounding them.

b) These studies have concluded that adult entertainment uses have an adverse impact on the surrounding neighborhoods.

c) Residential neighborhoods in proximity to adult uses suffer adverse effects including increased crime rates, lowered property values, and increased transiency.

d) Values of both commercial and residential properties are diminished when located in proximity to adult entertainment businesses.

e) The adverse impact on commercial areas is increased by the presence of more than one adult entertainment use in close proximity to another adult entertainment use.

f) The impact which an adult entertainment use has on the surrounding area appears to lessen as the distance from the adult entertainment use increases.

g) Reasonable "time, place and manner" restrictions which address the "secondary" impacts of adult entertainment uses are constitutionally permissible.

After conducting a public hearing, the Planning Commission adopted detailed findings and conclusions, including:

6. The concerns which have prompted public hearings in this city are similar to the concerns which motivated the communities of Indianapolis, Indiana; St. Paul, Minnesota; Phoenix, Arizona; and Seattle, Washington to undertake their studies of adult entertainment uses; consequently, the results of those studies are relevant to the existing or foreseeable impacts which such uses can have on the areas surrounding them in this city.

7. The concentration of adult entertainment uses in commercial areas or the location of adult entertainment uses in close proximity to residential uses, churches, parks and schools will result in devaluation of property values and decreases in commercial business sales, thereby reducing tax

revenues to the City and adversely impacting the economic well-being of the citizens of this City.

8. Location of adult entertainment uses in proximity to residential uses, churches, parks, schools, bars, and other adult entertainment uses very likely would lead to increased levels of criminal activities, including prostitution, rape, assaults, and other sex-related crimes in the vicinity of such adult entertainment uses.

At its April 18, 1988, meeting, the Common Council took up the Commission's recommendation that the City amend its zoning code to restrict the location of adult establishment uses. The Council reviewed the Planning Department study and heard testimony by the Planning Department, Planning Commission, and local residents. After finding that other cities' studies "are relevant to the existing or foreseeable impacts which such uses can have on the areas surrounding them in this city," the Council adopted Ordinance No. 2590.

Despite this thorough legislative process, the district court concluded that the City was unreasonable in relying upon the other cities' studies because they did not specifically address businesses similar to Downtown Book and Video, that is, adult bookstores "that offer both sexually explicit and non-sexually explicit materials and allow only off-premises consumption of those materials." ILQ urges us to uphold this ruling, asserting that, for this reason, Ordinance No. 2590 is not "narrowly tailored to regulate only those adult uses shown to have caused adverse secondary effects."

The legislative history of Ordinance No. 2590 does not support the district court's conclusion. The studies the Common Council found relevant to Rochester's problems identified and

measured adverse secondary effects linked to adult businesses generally --higher crime, neighborhood deterioration, lower property values, and an increase in transients -- as well as adverse secondary affects specifically attributable to adult bookstores:

- The Indianapolis study included a national survey of real estate appraisers. Of the 507 responding appraisers, 80% opined that an adult bookstore would reduce the value of residential properties within one block of the site, and 72% opined that an adult bookstore would reduce the value of commercial properties within one block. "This negative impact dissipates markedly as the distance from the site increases."
- The St. Paul study included one neighborhood in which 20% of the City's adult entertainment establishments, including the only adult bookstore, were located. The documented secondary effects included "discarded pornographic literature allegedly found in the streets, sidewalks, bushes and alleys near adult businesses. Such literature is sexually very explicit, even on the cover, and . . . becomes available to minors even though its sale to minors is prohibited."
- The St. Paul study concluded that a concentration of adult businesses in one area causes the greatest neighborhood problems. "In many cities, adult bookstores and movie theatres are associated with the most serious land use problems. This pattern persists in Saint Paul as well."

ILQ argues that Rochester was constitutionally required to disregard these studies because none evaluated the secondary

effects of a bookstore offering non-adult as well as adult materials and having no facilities for on-premises consumption. That is simply not the law. "[T]he requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" Ward, 491 U.S. at 799, quoting United States v. Albertini, 472 U.S. 675, 689 (1985). Under City of Renton, Rochester need not prove that Downtown Book and Video would likely have the exact same adverse effects on its surroundings as the adult businesses studied by Indianapolis, St. Paul, and Phoenix. So long as Ordinance No. 2590 affects only categories of businesses reasonably believed to produce at least some of the unwanted secondary effects, Rochester "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 (1976) (plurality opinion).

Rochester relied upon studies that identified specific adverse secondary effects attributable to adult bookstores. The City reasonably believed that evidence was relevant to the problems addressed by Ordinance No. 2590. Even if Downtown Book and Video is a new type of adult business,[5] it may not avoid time, place, and manner regulation that has been justified by studies of the secondary effects of reasonably similar businesses. See Holmberg, 12 F.3d at 143-44.

ILQ does not argue that Ordinance No. 2590 unreasonably limits alternative avenues of communication, the third prong of the City of Renton test. Accordingly, on the preliminary injunction

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[5] An affidavit by IL's president recites that "on-premises viewing booths, otherwise known as 'peep shows' . . . are an absolute essential component" of the 70 adult bookstores in 25 States that he has personally visited.

record before us, we conclude that this ordinance may validly be applied to Downtown Book and Video under City of Renton.

III.

The district court also concluded that ILQ will likely prevail on the merits of two other constitutional claims: first, that Ordinance No. 2590 is impermissibly vague because it classifies a business as an adult bookstore if a "substantial or significant portion" of its merchandise is sexually explicit; and second, that Ordinance No. 2590 is impermissibly broad because the term "adult establishment" includes a business that offers and entertainment "characterized by an emphasis" on sexually explicit activity.

Rochester argues that ILQ lacks standing to raise these claims because Downtown Book and Video is unquestionably an "adult bookstore" and an "adult establishment" within the meaning of Ordinance No. 2590. See American Mini Theatres, 427 U.S. at 58-59; Parker v. Levy, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."). ILQ replies that the impact of this ordinance on Downtown Book and Video is nonetheless uncertain because Rochester zoning officials refuse to clarify what amount of sexually explicit material will violate this criminal statute.[6] Compare Kolender v. Lawson, 461 U.S. 352, 357-58 (1983).

On this record, we find ILQ's argument unpersuasive. ILQ's First Amendment interest is relatively weak -- "there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic

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[6] A violation of these Rochester zoning ordinances is a misdemeanor punishable by up to a $700 fine and 90 days in prison for each day of violation.

expression than in the free dissemination of ideas of social and political significance." American Mini Theatres, 427 U.S. at 61. ILQ is not primarily concerned with its right of free expression, or it would have located Downtown Book and Video in an unrestricted part of the City. ILQ is also not primarily concerned with the risk of criminal prosecution, or it would have applied for a change-of-use certificate rather than confronting the City with an up-and-running adult bookstore in the downtown area. Given the City's properly substantiated interest in these zoning regulations, we see no reason why ILQ should not be subject to the same tensions and uncertainties that zoning regulations typically impose upon other legitimate enterprises.

Moreover, the portions of this detailed ordinance that ILQ attacks are not devoid of meaningful legislative standards. The limiting term, "characterized by an emphasis" on the sexually explicit, which ILQ characterizes as overly broad, has been widely construed since it was discussed and upheld in the Supreme Court's 1976 decision in American Mini Theatres. The limiting term, "substantial portion" of a bookstore's merchandise, which ILQ characterizes as impermissibly vague, appears frequently in the United States Code. See, e.g., 42 U.S.C. § 2000a(c) ("The operations of an establishment affect commerce if a substantial portion of the food which it serves . . . has moved in commerce"). In these circumstances, we conclude that ILQ's vagueness and overbreadth arguments are not likely to succeed. As the Supreme Court said in American Mini Theatres, 427 U.S. at 61:

> [T]he only vagueness in the ordinances relates to the amount of sexually explicit activity that may be portrayed before the material can be said to be "characterized by an emphasis" on such matter. For most films the question will be readily answerable; to the extent that an area of

doubt exists, we see no reason why the ordinances are not "readily subject to a narrowing construction by the state courts."

ILQ intentionally declined to present its vagueness and overbreadth claims to the state courts, choosing instead to bring these claims, in the form of largely hypothetical enforcement issues, in federal court. We think the district court erred in concluding that these claims are likely to prevail.

IV.

We conclude that the preliminary injunction should not have been granted. ILQ is unlikely to prevail on the merits of its First Amendment and due process claims and therefore has failed to prove that substantial First Amendment interests are being irreparably injured by Rochester's time, place, and manner regulation of Downtown Book and Video. The public interest is not served by premature federal court intervention in regulatory matters of strong local interest. Accordingly, the district court's order of February 22, 1993, is reversed.

HEANEY, Senior Circuit Judge, concurs in the result.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

AMENDMENT I.

Freedom of religion, speech and press; peaceful assemblage; petition of grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV.

§1. Citizenship rights not to be abridged by states.

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction and equal protection of the laws.

Supreme Court, U.S.
FILED
NOV 2 1994
OFFICE OF THE CLERK

No. 94-595

In The

Supreme Court of the United States

October Term, 1994

ILQ INVESTMENTS, INC., a Minnesota corporation, and EXCALIBUR GROUP, INC.,

Petitioners,

v.

CITY OF ROCHESTER, a municipal corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Petitioners,

v.

CITY OF ROCHESTER, a municipal corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The City Attorney of the City of Rochester, Minnesota, on behalf of the City of Rochester, respectfully requests this Court to deny the Petition for Writ of Certiorari which seeks the review of the decision of the Eighth Circuit Court of Appeals in this case. The Eighth Circuit opinion is reported as *ILQ Investments, Inc. v. City of Rochester,* 25 F.3d 1413 (8th Cir. 1994).

In its decision, the Eighth Circuit reversed the granting of a preliminary injunction by the United States District Court for the District of Minnesota, reported as *ILQ Investments, Inc. v. City of Rochester,* 816 F.Supp. 516 (D. Minn. 1993). The Petition should be denied because the

Petitioner [hereinafter "ILQ"] failed to show why this Court should exercise its extraordinary and discretionary jurisdiction to review the Eighth Circuit decision that Rochester Ordinance No. 2590 will likely prevail against ILQ's First Amendment and due process claims.

STATEMENT OF THE CASE

In early 1987, the City of Rochester Common Council discussed the close proximity of adult bookstores in the Rochester downtown area. Concerned about the possible adverse secondary effects from the concentration of adult establishments, the Council began an extensive study of the concentration of adult businesses and any problems that might occur when adult uses are located in close proximity to one another and other uses. Appendix at A-139.

In April, 1988, after conducting a study of adult entertainment uses, their adverse secondary effects, and holding several public hearings, the Council enacted Ordinance Number 2590 which is a zoning ordinance defining and restricting the location of "adult establishment uses." Appendix at A-141. According to the Ordinance, an adult establishment cannot be located less than 750 feet from any residential district boundary, church, school, or from any youth facility. Appendix at A-22. The Ordinance defines an "adult establishment use" to include an "adult bookstore" which it defines as a business selling printed matter if a substantial or significant portion of the material is characterized by an emphasis

on "specified sexual activities" or "specified anatomical areas." Appendix at A-14 – A-15.

In the summer of 1992, four years after passage of Ordinance Number 2590, ILQ opened the Downtown Book and Video store on the main floor of a commercial building in the premises formerly occupied by a retail china shop in downtown Rochester, Minnesota. Appendix at A-27. Downtown Book and Video segregates forty percent of its floor space into an adults-only area selling sexually explicit books, magazines, and novelty items that account for fifty percent of the store's total sales. Appendix at A-28.

On August 7, 1992, the Zoning Administrator issued two Notices of Violation. Appendix at A-26. The relevant notice alleged that ILQ was in violation of Ordinance No. 2590 as the store was an adult bookstore located within 750 feet of a youth facility (in this case, a public library). The Notices were upheld in subsequent administrative appeals. Appendix at A-34. ILQ did not challenge the Notices in state court. Appendix at A-136.

Instead, on November 4, 1992, ILQ filed an action with the federal district court in St. Paul, Minnesota, alleging that Ordinance No. 2590 violated the First Amendment. Appendix at A-1. ILQ does not contest that its business is located within 750 feet of the public library, nor do they contest that the public library constitutes a youth facility. Appendix at A-114.

On February 22, 1993, the district court granted a preliminary injunction enjoining the City "from taking any action, civil or criminal, to enforce the provisions of Ordinance No. 2590 against [ILQ]." Appendix at A-111. The

district court concluded that ILQ is likely to succeed on the merits of its constitutional challenge because the definition of "adult bookstore" was impermissibly vague, and because Rochester unreasonably relied upon other cities' studies to justify the Ordinance. Appendix at A-132.

Rochester appealed the preliminary injunction to the Eighth Circuit Court of Appeals challenging the district court's conclusion that ILQ is likely to succeed on the merits of its constitutional claims. Appendix at A-137. Concluding that Ordinance No. 2590 will almost certainly survive constitutional challenge under *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986), the Eighth Circuit reversed the preliminary injunction. Appendix at A-135.

According to the Eighth Circuit decision, *City of Renton* allows Rochester to rely upon studies or evidence supplied by other cities so long as that information is reasonably believed to be relevant to the problem the city wishes to address. Appendix at A-143. The Eighth Circuit also held that Rochester's definition of adult bookstore may refer to a substantial or significant portion of the bookstore's material based upon the decision in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 61 (1976). Appendix at A-145. Petitioners now seek a Writ of Certiorari from this Court.

REASONS FOR DENYING THE PETITION

The Court should exercise its discretion by not granting the Petition because it fails to show any "special and important reasons" justifying this Court's review of the

Eighth Circuit decision. Sup. Ct. R. 10.1. The Eighth Circuit decision does not conflict with a decision of this Court nor with any decisions of other United States Courts of Appeal. *Id.* at 10.1(a). Because this case does not meet the standard this Court established for granting review on Writ of Certiorari, the Petition should be denied.

I. THE PETITIONERS FAILED TO SHOW WHY THIS COURT SHOULD EXERCISE ITS EXTRAORDINARY AND DISCRETIONARY JURISDICTION TO REVIEW THE EIGHTH CIRCUIT DECISION UPHOLDING THE CONSTITUTIONALITY OF ROCHESTER ORDINANCE NO. 2590.

A. The Eighth Circuit decision is not a final decision.

The Eighth Circuit addressed the federal district court's grant of a preliminary injunction. No court has made a final decision regarding the merits of ILQ's lawsuit and the matter remains unresolved. Indeed, the federal district court in St. Paul, Minnesota, is scheduled to hear a summary judgment motion in this case on November 10, 1994.

The customary judicial practice is to decline to reach and decide constitutional issues until compelled to do so. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584 (1952). Interlocutory relief, which is the only decision reached in this case, does not compel this Court to reach any constitutional issue. "In reviewing such interlocutory relief, this Court may only consider whether issuance of the injunction constituted an abuse of discretion." *Brown*

v. Chote, 411 U.S. 452, 457 (1973). *See also University of Texas v. Camenisch*, 451 U.S. 390, 394 (1981). Thus, this Court's standard of review for interlocutory relief does not require any analysis of the applicable constitutional issues.

Accordingly, the manner in which this case comes to the Court does not compel the Court to reach any constitutional issue. The Court should deny the petition on that basis alone.

B. The issues raised by Petitioners are not sufficiently important to warrant this Court's review of the Eighth Circuit decision.

ILQ contends that the Eighth Circuit decision reversing the federal district court's grant of a preliminary injunction raises serious legal issues because of conflicts with this Court's decisions and other federal court decisions. That simply is not the case. The Eighth Circuit gave full consideration to the issues and decided them correctly. The Eighth Circuit's decision complies with all of this Court's decisions and the vast majority of other court cases.

The Petition fails to raise any substantively important legal issue which requires this Court's attention. There are no novel or unique legal issues to be discussed. There are no unusual legal policy questions for the Court to resolve. This case is nothing more than one city's reliance on other cities' studies in drafting a zoning ordinance which restricts the location, but not the existence or operation, of adult entertainment businesses.

The caselaw is clear on this issue. This Court and other federal courts have made all of the needed determinations on this issue. All that the Eighth Circuit did was apply correctly the rules to this case. Recently, this Court denied review of the Eighth Circuit's decision in *Holmberg v. City of Ramsey*, 12 F.3d 140, 143 (8th Cir. 1993), *cert. denied*, ___ U.S. ___ (No. 93-1796, October 3, 1994), which addressed some of the same issues raised in this case. For the same reason, this Court's review of this case is simply unwarranted.

1. Time, Place and Manner Regulation

The Eighth Circuit determined that Rochester Ordinance No. 2590 should be analyzed as a form of time, place and manner regulation as it does not seek to ban adult entertainment uses. Appendix at A-137. Time, place and manner regulations are acceptable as they are content-neutral and intended to serve a substantial governmental interest. *City of Renton*, 475 U.S. at 46. Rochester's ordinance is content-neutral as it does not target a specific business, but instead addresses the undesirable secondary effects attributable to those businesses.

In 1988, four years *before* ILQ opened up its bookstore, the City of Rochester initiated a study in response to "concern over the effect that adult bookstores located along South Broadway were having on other businesses in their neighborhood and the downtown area in general." Appendix at A-41. After reviewing the studies performed by other cities addressing similar concerns, holding a public hearing, and considering the recommendations of its Planning and Zoning Commission, the Rochester

Common Council amended its zoning code to restrict the location of adult entertainment uses.

Specifically, the Council adopted Ordinance No. 2590 after determining that other cities' studies "are relevant to the existing or foreseeable impacts which such uses can have on the areas surrounding them in this city." Appendix at A-141. Rochester followed a process virtually identical to the one recently upheld in *Lakeland Lounge v. City of Jackson*, 973 F.2d 1255, 1258 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1845, 123 L.Ed.2d 469 (1992).

Indeed, it would appear that there was more evidence before the Rochester Common Council when it enacted Ordinance No. 2590 than when other governing bodies enacted similar ordinances. In *Young v. American Mini Theatres*, the legislative body had before it the testimony of a single expert concerning the effect of adult businesses on neighborhoods. In *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821, 828-29 n.9 (4th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980), the legislative body had nothing more before it than a county health officer's report. Yet, despite this sparse record, the Fourth Circuit held that "the record does show that the sponsor of the legislation was concerned to bring these secondary effects to the legislature's attention." *Id.* at 828. *See also Ambassador Books & Video, Inc. v. City of Little Rock*, 20 F.3d 858, 863 (8th Cir. 1994) (ordinance is content-neutral even if there is some evidence that it was enacted to suppress otherwise protected speech). The evidence overwhelmingly supports the Eighth Circuit's holding that the legislative process leading up to the enactment of Ordinance No. 2590 was "thorough" (Appendix at A-141) and directed at the adverse effects associated with adult businesses

(Appendix at A-143). Rochester's Ordinance is properly analyzed as a time, place and manner regulation addressing adverse effects rather than a specific form of expression. Accordingly, there is no need for this Court's attention to this issue.

2. Substantial Governmental Interest

As this Court explained in *City of Renton*, a city may establish its substantial interest in its regulation by compiling a record with evidence that may be "reasonably believed to be relevant to the problem that the city addresses." *City of Renton*, 475 U.S. at 51-2. A city must show "some relevant evidence to demonstrate that the zoning ordinance was intended to address the secondary effects of adult businesses." *Christy v. City of Ann Arbor*, 824 F.2d 489, 493 (6th Cir. 1987), *cert. denied*, 484 U.S. 1059 (1988).

As noted, Rochester relied upon studies of other cities in reaching its conclusion that regulations were needed to reduce adverse secondary effects from adult businesses. A legitimate governmental purpose may be shown by reasonable inference from specific testimony of individuals, local studies, or the experiences of other cities. *SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1274 (5th Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989).

Yet, ILQ argues that Rochester must disregard those studies as they do not address the precise form of business which ILQ operates (i.e., a bookstore offering non-adult as well as adult materials). As noted by the Eighth Circuit decision in this case, "[t]hat is simply not the

law." Appendix at A-143. Just last zyear, the Eighth Circuit made this point very clear. *Holmberg v. City of Ramsey,* 12 F.3d at 143 ("Because the City reasonably believed the studies were relevant to the problems in Ramsey, the City satisfied its burden.")

The law is clear that all the city must show is that it relied upon evidence it "reasonably believed to be relevant to the problem that the city addresses." *City of Renton,* 475 U.S. at 51-2. Courts have not invalidated ordinances where the specific use regulated by the ordinance is not identical to the uses considered in the secondary effects study. In *Wall Distributors, Inc. v. City of Newport News,* 782 F.2d 1165, 1169 (4th Cir. 1986), the Fourth Circuit rejected the argument which the Petitioners advance in this case. Instead, the court ruled that "a court in constitutional review need only conclude that the City has advanced sufficient government interests." *Id.* Other courts reached a similar conclusion. *See e.g., T-Marc, Inc. v. Pinellas County,* 804 F.Supp. 1500, 1503 (M.D. Fla. 1992) ("Thus, *Renton* only requires that the evidence relied upon is reasonably believed to be relevant to the problem. *Renton* does not require comparisons to other types of establishments.").

Even if the ILQ's argument is correct and Rochester was required to study adult businesses identical to that operated by Petitioners, the Eighth Circuit determined that those studies relied upon by Rochester did *not* deal solely in adult material. The Indianapolis and St. Paul studies, relied upon by Rochester, identified and described adverse secondary effects *"specifically attributable to adult bookstores."* Appendix at A-142 (emphasis in original).

Rochester acted reasonably in relying on other cities' studies of adverse secondary effects from adult entertainment businesses. The Eighth Circuit acted correctly in relying on this Court's decision in *City of Renton* in its holding that "Rochester need not prove that Downtown Book and Video would likely have the exact same adverse effects on its surroundings as the adult businesses studied by Indianapolis, St. Paul, and Phoenix." Appendix A-143. Perhaps it was the Third Circuit which said it best when it stated that a legislative body "does not need to survey every adult book store in the state to determine the effect the statute or regulation will have on each." *Mitchell v. Com'n on Adult Entertainment Est.*, 10 F.3d 123, 138 (3d Cir. 1993).

All that the Constitution requires is that the city reasonably believe the studies are relevant. That is all this Court required in *City of Renton* and all that should be required of Rochester in this case. Accordingly, there is no need for this Court's attention to this issue.

3. Failure to substantiate statutory vagueness.

Contrary to ILQ's argument, the limiting terms "characterized by an emphasis" (as to sexually explicit material) and "substantial portion" (as to a bookstore's merchandise) are not overly broad. The term "characterized by an emphasis" was upheld by this Court in *American Mini Theatres* and by subsequent federal courts. And, as the Eighth Circuit noted in this case,

> [t]he limiting term, "substantial portion" of a bookstore's merchandise, which ILQ characterizes as impermissibly vague, appears frequently

> in the United States Code. *See, e.g.*, 42 U.S.C. §2000a(c) ("The operations of an establishment affect commerce if a substantial portion of the food which it serves . . . has moved in commerce.").

Appendix at A-145.

The vast majority of courts find no inherent vagueness in the use of these terms as part of the definition of adult bookstore. In *511 Detroit Street, Inc. v. Kelley*, 807 F.2d 1293, 1296 (6th Cir. 1986), the Sixth Circuit rejected the argument ILQ advances in this case and held that "the terms of the statute are found throughout the law and are within the understanding of ordinary people." In *S&G News, Inc. v. City of Southgate*, 638 F.Supp. 1060 (E.D. Mich. 1986), *aff'd* 819 F.2d 1142 (6th Cir. 1987), the federal district court upheld the term "substantial or significant portion" based upon *American Mini Theatres*.

These are not isolated cases addressing the vagueness issue. There are many more federal cases reaching a similar holding. *See also Basiardanes v. City of Galveston*, 682 F.2d 1203, 1210 (5th Cir. 1982) ([w]e find no real and substantial ambiguity here, and to the extent that 'regular' is vague, state courts may clarify it without insuperable difficulty"); *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979); *15192 Thirteen Mile Road, Inc. v. City of Warren*, 626 F.Supp. 803, 820 (E.D. Mich. 1985) (terms "substantial or significant portion" were reasonably specific and precise); *Nortown Theatre Incorporated v. Gribbs*, 373 F.Supp. 363, 367 (E.D. Mich. 1974), *aff'd on other grounds sub nom., Young v. American Mini Theatres*, 427 U.S. 50 (1976) ("the word 'substantial' as used in the

definition of Adult Book Store is not so indefinite as to render the ordinance void and unenforceable").

The vast and overwhelming majority of cases are clear. The phrases "substantial or significant" and "characterized by an emphasis on" are not unconstitutionally vague. This court, and other courts as well, have previously visited this issue and there is simply no need to revisit it. ILQ's "vagueness" argument provides no reasonable basis for this Court to grant certiorari in this case.

4. Lack of Conflicting Decisions

ILQ contends that the Eighth Circuit's decision in this case conflicts with this Court's decisions and those of the federal courts of appeal. In truth, as noted throughout this response, the Eighth Circuit's decision complies with all of this Court's decisions and the vast majority of federal and state court cases. Indeed, the Eighth Circuit's intervention in this case occurred solely because the federal district court's granting of the preliminary injunction deviated from the applicable caselaw (especially *City of Renton*).

ILQ cites two federal district court cases and one state court case as authority for a finding that the Eighth Circuit's decision here as to the vagueness issue "is in conflict with long-established decisions of this court, with opinions from other federal circuits, and with opinions from state courts of last resort." Appendix at A-20. *Cline v. City of Oklahoma City,* 839 P.2d 657 (Okla. Crim. App. 1992); *Pensack v. City and County of Denver,* 630 F.Supp. 177

(D. Colo. 1986); *Ellwest Stereo Theater v. Boner*, 718 F.Supp. 1553 (M.D. Tenn. 1989).

There is no need to review the facts of these cases and compare them to the facts of this case. The important fact is that these decisions have never been cited by any federal court in determining the applicable federal law on the vagueness issue. ILQ's attempt to conjure up a conflict will not succeed. There is no conflict and, accordingly, there is no reason this Court must visit this issue.

Similarly, ILQ relies upon *World Wide Video v. City of Tukwila*, 816 P.2d 18 (Wash. 1991) *cert. denied*, ___ U.S. ___, 112 S.Ct. 1672, 118 L.Ed.2d 391 (1992) for the proposition that a city must show that an adult business will produce the precise secondary effects which are addressed in other cities' studies. *World Wide Video* involved a business where only 10% of the material was adult-oriented. (This case involves a business where 40% of the material is adult-oriented. Appendix at A-135.) Furthermore, the majority opinion in *World Wide Video* noted that the Washington Constitution affords greater protection for speech than does the United States Constitution. The state court decision in *World Wide Video* has not been followed by other federal courts.

ILQ also places significant emphasis on *Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329 (9th Cir. 1987). *Tollis* reached one issue and one issue only. "Here, the County has presented no evidence that a single showing of an adult movie would have any harmful secondary effects on the community." *Tollis*, 827 F.2d at 1333. That "single showing" issue is *not* an issue in this case. True, ILQ raised it below, but the Eighth Circuit did not address nor

discuss it at all. Thus, *Tollis* is simply inapplicable to this case.

Indeed, at least one federal court refused to consider *Tollis* on the basis that it was based upon particular factual circumstances which were not present in the case before it. "The conclusions set forth in these cases [*Tollis*], therefore, do not control in the instant case." *Mitchell v. Com'n on Adult Entertainment Est.*, 802 F.Supp. 1112 (D. Del. 1992), *aff'd*, 10 F.3d 123 (3d Cir. 1993).

The Eighth Circuit's decision is not a deviation from the vast majority of applicable federal cases addressing similar issues. The Eighth Circuit realized that Rochester's Ordinance is patterned after a Detroit ordinance upheld by this Court in *Young v. American Mini Theatres.* The Eighth Circuit's decision is one of many decisions reaching similar conclusions concerning a time, place and manner regulation addressing adult businesses' adverse secondary effects. Thus, there is no compelling reason why this Court must re-address these same and repetitive issues.

C. PETITION SEEKS TO ADDRESS ISSUES NOT RAISED BELOW AND NOT DECIDED UPON BELOW.

ILQ raises issues in its Petition which were never addressed by the Eighth Circuit decision below or, if raised, were never decided. ILQ argues that Rochester's Ordinance makes a single sale or rental of sexually-explicit material a basis for determining an establishment to be an adult establishment. Petition at 22. ILQ also

argues that the Eighth Circuit held that ILQ lacked standing to pursue its vagueness claim (Petition at 9) and that ILQ should have brought their claims in state court (Petition at 18).

A close reading of the Eighth Circuit's decision, however, clearly reveals that the court below never addressed the "single sale or rental" issue. There is no mention of this issue anywhere in the opinion below. Additionally, the Eighth Circuit only discussed, but never decided the standing and state court issues. Appendix at A-144, A-146.

This Court avoids issues not addressed by the court of appeals. *United States v. United Continental Tuna Corp.* 425 U.S. 164 (1976). "This Court usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court." *Patrick v. Burget,* 486 U.S. 94, 100 n.5 (1988).

The Eighth Circuit did not base its decision on the single sale, standing, or pursuit of state remedies issues. Instead, the court below found Rochester's Ordinance likely to survive a constitutional attack as a result of a time, place and manner analysis and case law discussing the void-for-vagueness doctrine. Accordingly, ILQ's attempt to include these issues in its Petition for Certiorari is inappropriate and should be disregarded.

CONCLUSION

Petitioners failed to show why this Court should exercise its extraordinary and discretionary jurisdiction to review the Eighth Circuit's decision upholding the constitutionality of Rochester Ordinance No. 2590. Accordingly, Respondent requests the Petition be denied.

Respectfully submitted this 2nd day of November, 1994.

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